SUPREME COURT, U. S.

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No. 1187

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

CLIFFORD JONES, *Petitioner,*

v.

HONORABLE OLIVER GASCH, Judge of the United States District Court for the District of Columbia, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

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No.

CLIFFORD JONES, *Petitioner*,

v.

HONORABLE OLIVER GASCH, Judge of the United States District Court for the District of Columbia, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner prays that a writ of certiorari issue to review the order of the United States Court of Appeals for the District of Columbia Circuit, filed in the above-styled case on November 7, 1967 (No. 20951), denying petitioner's petition for writ of mandamus.

OPINIONS BELOW

The memorandum opinion of the United States District Court for the District of Columbia is unreported and is printed in Appendix C to this petition. The

opinion of the Circuit Court of Appeals has not yet been reported; it is printed in Appendix A to this petition.

JURISDICTION

The order of the Circuit Court of Appeals here sought to be reviewed was filed on November 7, 1967 (Chief Judge Bazelon dissenting), with opinions to issue later. (App. B(1), *infra*) On November 14, 1967, petitioner moved the Circuit Court of Appeals to extend the time to petition for rehearing until thirty days after the opinions of the Court should issue. Said petition was granted on November 21, 1967. The opinions of the Circuit Court of Appeals issued on December 8, 1967. A timely petition for rehearing en banc filed January 8, 1968, was denied by order filed January 31, 1968. (App. B(2), *infra*) The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

This petition presents the following questions:

Whether petitioner, the defendant in a federal criminal proceeding, upon his motion for transfer pursuant to Fed. R. Crim. P. 21(b), was required to disclose the nature of the testimony of his contemplated defense witnesses as a prerequisite to having such individuals considered *as defense witnesses* for purposes of the court's determination of the convenience of witnesses.

Whether petitioner, the defendant in a federal criminal proceeding, upon his motion for transfer pursuant to Fed. R. Crim. P. 21(b), was required to demonstrate that his contemplated defense witnesses are

necessary witnesses to matters relevant to his defense as a prerequisite to having such individuals considered *as defense witnesses* for purposes of the court's determination of the convenience of witnesses.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

U. S. Const. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fed. R. Crim. P. 21(b) (1966)

For the convenience of the parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to him or any one or more of the counts thereof to another district.

STATEMENT OF THE CASE

Petitioner Clifford Jones has resided and practiced law in Las Vegas, Nevada, for the past thirty years. On March 17, 1965, pursuant to summons, petitioner appeared and testified before a grand jury sitting in the District of Columbia and inquiring into the affairs of Robert G. Baker. The grand jury indicted peti-

tioner on January 5, 1966, on three counts of perjury alleged to have occurred during the course of his testimony, each count charging a violation of 18 U.S.C. § 1621. Count One charged that petitioner knowingly testified falsely when he told the grand jury that he had not caused First Western Financial Corporation (a Nevada corporation, doing business in Las Vegas and elsewhere, of which petitioner was an officer and director and in which he had a substantial stock interest) to issue ten checks to Wayne L. Bromley, with the knowledge and purpose that Bromley would cash the checks and transmit the proceeds to Robert G. Baker. Count Two charged that petitioner knowingly testified falsely when he told the grand jury that he had never had a conversation in Bromley's presence wherein the payment of money to Baker was discussed, assertedly because such a conversation had in fact occurred on or about April 21, 1963, at the Thunderbird Hotel in Clark County, Nevada. Count Three charged that petitioner knowingly testified falsely when he told the grand jury that either he or First Western Financial Corporation or First Western Savings and Loan Association (a subsidiary of First Western Financial Corporation) had retained Bromley as a lawyer to perform services related to legislation and that Bromley had furnished legislative materials to petitioner.

Petitioner pleaded not guilty and thereafter on March 28, 1966, along with motions seeking other and different relief, moved to have his case transferred to the District of Nevada, or alternatively that his trial be continued until after the trial of Baker. The motion for transfer sought to invoke, prospectively, revised Rule 21(b) of the Federal Rule of Criminal Pro-

cedure (effective July 1, 1966),[1] inasmuch as the multivenue requirement of the then Rule 21(b)[2] could not be met, the alleged perjury having occurred, if at all, solely in the District of Columbia. District (now Chief) Judge Curran denied the motion for transfer, without prejudice, as being premature, but continued petitioner's trial until after Baker's trial.

Baker was convicted on January 29, 1967, and an appeal is pending from his conviction. On February 17, 1967, respondent District Judge Gasch heard argument on petitioner's renewed motion for transfer. He denied the motion in a memorandum opinion of April 11, 1967 (App. C). Both initially and when renewed, petitioner's motion to transfer showed by affidavit that forty Nevada residents had indicated their availability to testify as to his reputation for truth and veracity and that he wished to call twenty-nine Nevada or California witnesses to testify on the merits. The names, addresses and occupations of all proposed witnesses were supplied in the affidavit. Additionally, the affidavit showed that it would be a matter of substantial inconvenience and expense to petitioner and all his

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[1] Revised Fed. R. Crim. P. 21(b) (effective July 1, 1966) provides: "For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to him or any one or more of the counts thereof to another district."

[2] Before the 1966 revision, Fed. R. Crim. P. 21(b) provided: "The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged."

witnesses should they be compelled to travel some 2,500 miles from Nevada to the District of Columbia to testify.

The government has represented that it intends to call twenty witnesses to testify on the merits, thirteen of whom reside in the vicinity of the District of Columbia.

Respondent, in weighing the convenience of the witnesses, effectively credited petitioner with no (zero) witnesses. Accordingly, respondent found the balance of convenience to be in favor of the government and denied the motion. Respondent disposed of all of petitioner's witnesses in the following fashion: As to the witnesses on the merits, he held:

> "Nowhere does the defendant [petitioner] disclose the nature of their [petitioner's witnesses on the merits] expected testimony nor does he provide an adequate basis to enable the Court to determine whether these individuals may even be properly classified as 'witnesses.' In fact, the limited disclosure made by the defendant leaves the Court with some doubt whether these 29 individuals will all be necessary witnesses to matters of relevance for the defense." (App. C, 36)

and as to the witnesses on petitioner's reputation for truth and veracity, he held:

> "The fact that some 40 individuals are willing to testify as to the defendant's [petitioner's] good character is not persuasive. It is well established that a trial judge may within his discretion limit the number of 'character' witnesses called by a defendant and sound judicial management would suggest that he do so." (App. C, 37)

Upon review, by means of petitioner's petition for writ of mandamus, which sought either a change in venue or remand to respondent with instructions as to the proper standards to be applied, the Court of Appeals left undisturbed respondent's finding that petitioner effectively had no witnesses to weigh in the balance of convenience, and upheld his denial of the motion for transfer as a sound exercise of discretion. (App. A, 22). This it did despite the finding that petitioner had disclosed the names, addresses and occupations of potential defense witnesses and at the hearing before respondent on the motion had "indicated in some degree the nature of the evidence witnesses on the merits were expected to furnish. Petitioner undertook a general showing on the materiality of the testimony of most of the witnesses named on his list." (App. A, 14)

REASONS FOR GRANTING THE WRIT

The writ should issue to insure the fair and sound administration of justice in federal criminal proceedings and more particularly to establish proper standards to be applied by federal courts when determining motions to transfer which invoke Fed. R. Crim. P. 21(b), as revised and effective July 1, 1966.[3] Here the respondent has ruled, and the Court of Appeals has acquiesced in the ruling, that the defendant in a federal criminal proceeding must, in effect, disclose in advance of trial the substance of his defense in order that he may have considered the convenience of his proposed witnesses on his motion for transfer; that is, the defendant, in order to have his proposed witnesses con-

[3] The text of the revised rule is set out at note 1, *supra*. The predecessor rule is set out at note 2, *supra*.

sidered *as witnesses* at all (much less to prevail on his motion for transfer), must disclose the nature of his witnesses' testimony and satisfy the trial court that his witnesses are in fact necessary to his defense.

Such a standard, if sanctioned by this Court, will thwart at the outset the effect intended to be secured by revised Fed. R. Crim. P. 21(b), in that it imposes a more restrictive test for transfer than ever was required under the rule before its revision. What is more important, however, there lurks in the standard imposed by respondent a requirement of doubtful constitutional validity regarding the disclosure that may be required of a defendant in a federal criminal proceeding.

The 1966 revision of Fed. R. Crim. P. 21(b) was intended, *inter alia,* to undo the effect of *Travis* v. *United States,* 364 U.S. 631 (1961), which had required that the accused in a federal criminal proceeding stand trial in the District of Columbia, far removed from his home and sources of proof in Colorado, solely because it was found that venue was literally proper only in the District of Columbia. See Notes of Advisory Committee on Rules, 18 U.S.C.A. Rule 21, 1967 Pocket Part, at 206. The revised rule is thus in harmony with, and implements, other decisions of this Court which favor the trial of criminal defendants in the vicinity of their homes and close to the sources of evidence on their behalf, including witnesses. *United States* v. *Cores,* 356 U.S. 405 (1958); *United States* v. *Johnson,* 323 U.S. 273 (1944); *Hyde* v. *Shine,* 199 U.S. 62 (1905).

The sole occasion for petitioner's indictment in the District of Columbia was his appearance, for the con-

venience and at the summons of the government, before a grand jury sitting here. And as appears from petitioner's indictment, the events about which he is alleged to have given perjured testimony occurred in Nevada. The most cursory comparison of the original with the revised Fed. R. Crim. P. 21(b) reveals that its chief characteristic after revision is the absence of the requirement that the venue of trial be laid at a place where the crime was committed. In place of the excised multi-venue requirement of the rule there was substituted for paramount consideration "the convenience of parties and witnesses." Respondent's purported balancing of the convenience of petitioner's and the government's witnesses involved his prior determination, effectively, that petitioner had no witnesses to weigh in the balance. This prior determination flowed from respondent's application of a standard which, with one possible exception discussed in the next paragraph, is without precedent and is hence a marked departure from settled federal law regarding motions for transfer in criminal cases. With the possible exception just noted, research demonstrates that in no case where convenience of witnesses has been mentioned or discussed, has a defendant been required, upon his motion for transfer, to disclose the nature of the testimony of his witnesses and to show that the witnesses he proposes are needed for his defense.[4]

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[4] *United States* v. *Austin Co.*, 273 F. Supp. 360 (S.D.N.Y.1967); *United States* v. *Wolfson*, 269 F. Supp. 621 (S.D.N.Y. 1967); *United States* v. *Hinton*, 268 F. Supp. 728 (E.D. La. 1967); *United States* v. *Pilnick*, 267 F. Supp. 791 (S.D.N.Y. 1967); *United States* v. *West Coast News Co.*, 357 F. 2d 855 (6th Cir. 1966); *United States* v. *Inches*, 253 F. Supp. 312 (D. Ariz. 1966); *United States* v. *Tremont*, 351 F. 2d 144 (6th Cir. 1965); *United States* v. *Luros*, 243 F. Supp. 160 (N.D. Iowa 1965); *United States* v. *Jessup*, 38 F.R.D. 42 (M.D. Tenn. 1965); *Minnesota Mining & Mfg. Co.* v.

In *Lindberg* v. *United States*, 363 F. 2d 438 (9th Cir. 1966), the court, in the second paragraph of a two paragraph opinion, said the following:

> "Defendant also complains of the denial of his Rule 21(b) motion for transfer of the proceedings to another district. The defendant did not support his motion with a showing of specific circumstances from which the district court could conclude that the proceeding should be transferred in the interests of justice. Thus, although defendant asserted that defense witnesses were located in the district to which transfer was sought, the witnesses were not named or otherwise described and the nature of their expected testimony was not dis-

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Platt, 314 F. 2d 369 (7th Cir. 1963), *rev'd* 376 U.S. 240 (1964); *United States* v. *Amador Casanas*, 233 F. Supp. 1001 (D.D.C. 1964); *United States* v. *U. S. Steel Corp.*, 233 F. Supp. 154 (S.D.N.Y. 1964); *United States* v. *U. S. Steel Corp.*, 226 F. Supp. 152 (S.D.N.Y. 1964); *United States* v. *Cohen*, 35 F.R.D. 227 (N.D. Cal. 1964); *United States* v. *Foster*, 33 F.R.D. 506 (D. Md. 1963); *United States* v. *Sorce*, 308 F. 2d 299 (4th Cir. 1962); *United States* v. *Suchman*, 206 F. Supp. 688 (D. Md. 1962); *United States* v. *Freeling*, 31 F.R.D. 540 (S.D.N.Y. 1962); *United States* v. *General Motors Corp.*, 194 F. Supp. 754 (S.D.N.Y. 1961); *United States* v. *Van Allen*, 28 F.R.D. 329 (S.D.N.Y. 1961); *United States* v. *Olen*, 183 F. Supp. 212 (S.D.N.Y. 1960); *United States* v. *Kimball Securities, Inc.*, 25 F.R.D. 172 (S.D.N.Y. 1960); *United States* v. *Rossiter*, 25 F.R.D. 258 (D.P.R. 1960); *Scott* v. *United States*, 255 F. 2d 18 (4th Cir. 1958); *United States* v. *Tellier*, 19 F.R.D. 164 (E.D.N.Y. 1956); *United States* v. *Valle*, 16 F.R.D. 519 (S.D.N.Y. 1955); *United States* v. *United States District Court*, 209 F. 2d 575 (6th Cir. 1954); *United States* v. *Warring*, 121 F. Supp. 546 (D. Md. 1954); *United States* v. *White*, 95 F. Supp. 544 (D. Neb. 1951); *United States* v. *Holdsworth*, 9 F.R.D. 198 (D. Md. 1949); *United States* v. *Erie Basin Metal Products Co.*, 79 F. Supp. 880 (D. Md. 1948); *United States* v. *Hughes Tool Co.*, 78 F. Supp. 409 (D. Hawaii 1948); *United States* v. *Eisler*, 75 F. Supp. 634 (D.D.C. 1947); *United States* v. *National City Lines*, 7 F.R.D. 393 (S.D. Cal. 1947); *United States* v. *Helwig*, 7 F.R.D. 187 (W.D. Pa. 1947); *Gates* v. *United States*, 122 F. 2d 571 (10th Cir. 1941).

closed. It was not an abuse of discretion to deny a motion based upon so inadequate a showing." 363 F. 2d at 438-439.

This case was decided after a conviction and before revised Rule 21(b) became effective and it represents the single instance known to petitioner where it has been suggested that a defendant might be obliged to disclose the nature of the testimony of defense witnesses in order to have their convenience weighed upon a motion for transfer. A reasonable reading of the court's ruling suggests that it was the total deficiency of Lindberg's showing that prompted the decision rather than the single failure to disclose the nature of defense testimony. Here, of course, petitioner has disclosed the names, addresses and occupations of the witnesses he wishes to call *and* in some degree indicated the nature and materiality of their testimony. It is amply demonstrated therefore that respondent's insistence upon petitioner's showing the nature of defense testimony and the need for proposed defense witnesses is so radical a departure from accepted standards as to warrant inquiry by this Court as to its propriety.

The decisions of respondent and the Court of Appeals require of petitioner no less than that, as the price for consideration of his motion for transfer, he disclose well in advance of trial the substance of the testimony of witnesses he expects to call in his defense and that he affirmatively satisfy the respondent that the witnesses he wishes to call are in fact necessary to his defense. Both of the elements of disclosure required by respondent constitute the imposition of an unreasonable and improper standard for evaluating the merits of his motion for transfer because they run afoul of his right as an accused in a federal criminal

proceeding not to be required to supply the prosecution with evidence. Our jurisprudence quite unmistakably guarantees that an accused, upon a plea of not guilty, puts the prosecution to its proof upon every element of the offense charged, and that the accused may present evidence in his defense, if he chooses to do so at all, only after the government has revealed its entire case against him. The decisions of the courts below clearly offend these principles.

It is the further right of an accused, as a matter of positive law, that is, Fed. R. Crim. P. 21(b), to seek a change in the venue of his trial. The effect of the decisions below is to condition petitioner's exercise of his latter right upon his willingness to forego the protection of his former right—the right to remain silent. This may not be required of him. Accord, *Sherbert* v. *Verner,* 374 U.S. 398 (1963); *United States* v. *Simon,* 262 F. Supp. 64 (S.D.N.Y. 1966), *rev'd on other grounds,* 373 F. 2d 649 (2d Cir. 1967), *vacated as moot sub nom. Simon* v. *Wharton,* 88 Sup. Ct. 577 (1967); see *Steinberg* v. *United States,* 163 F. Supp. 590 (Ct. Cl. 1958).

Mr. Justice Douglas, joined by Mr. Justice Black, has heretofore expressed the concern that conditioning a defendant's exercise of a right accorded him by the Federal Rules of Criminal Procedure—in that instance, the right to discovery under Fed. R. Crim. P. 16(a) or (b)—upon his willingness to submit to discovery—pursuant to Fed. R. Crim. P. 16(c)—posed a serious constitutional question.[5] Mr. Justice Douglas said:

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[5] Statement of Mr. Justice Douglas upon transmission to Congress of revised Federal Rules of Criminal Procedure, 383 U.S. 1089 (1966). Mr. Justice Black noted his concurrence in Mr. Justice Douglas' remarks at 383 U.S. 1082 (1966).

"In my judgment, the amendments to Rule 16 dealing with discovery require further reflection. To the extent that they expand the defendant's opportunities for discovery, they accord with the views of a great many commentators who have concluded that a civilized society ought not to tolerate the conduct of a criminal prosecution as a 'game.' [footnote omitted] But the proposed changes in the Rule go further. Rule 16(c) would permit a trial judge to condition granting the defendant discovery on the defendant's willingness to permit the prosecution to discover 'scientific or medical reports, book, papers, documents, tangible objects, or copies or portions thereof' which (1) are in the defendant's possession; (2) he intends to produce at trial; and (3) are shown to be material to the preparation of the prosecution's case. [footnote omitted]

"The extent to which a court may compel the defendant to disclose information or evidence pertaining to his case without infringing the privilege against self-incrimination is a source of current controversy among judges, prosecutors, defense lawyers, and other legal commentators. A distinguished state court has concluded—although not without a strong dissent—that the privilege is not violated by discovery of the names of expert medical witnesses whose appearance at trial is contemplated by the defense. [footnote omitted] I mean to imply no views on the point, except to note that a serious constitutional question lurks here.

"The prosecution's opportunity to discover evidence in the possession of the defense is somewhat limited in the proposal with which we deal in that it is tied to the exercise by the defense of the right to discover from the prosecution. But *if* discovery, by itself, of information in the possession of the defendant would violate the privilege against self-

> incrimination, is it any less a violation if conditioned on the defendant's exercise of the opportunity to discover evidence? May benefits be conditioned on the abandonment of constitutional rights? See, e.g., *Sherbert* v. *Verner*, 374 U.S. 398, 403-406, 83 S.Ct. 1790, 1793-1795, 10 L. Ed. 2d 965. To deny a defendant the opportunity to discovery—an opportunity not withheld from defendants who agree to prosecutorial discovery or from whom discovery is not sought—merely because the defendant chooses to exercise the constitutional right to refrain from self-incrimination arguably imposes a penalty upon the exercise of that fundamental privilege. It is said, however, that fairness may require disclosure by a defendant who obtains information from the prosecution. Perhaps—but the proposed rule establishes no such standards. Its application is mechanical: if the defendant is allowed discovery, so, too, is the prosecution. No requirement is imposed, for example, that the subject matter of the material sought to be discovered by the prosecution be limited to that relating to the subject of the defendant's discovery." 383 U.S. at 1089-1092.

Petitioner here has been forced to the very kind of choice that disturbed Justices Douglas and Black, a choice which they have indicated he may not properly be called upon to make.

Petitioner's plight, however, is even more aggravated and unfair than that of a defendant seeking discovery from the government. On a motion for discovery, a defendant receives the benefit of information in exchange for his relinquishing information of his own. But in the instant proceeding, petitioner's disclosure, if made, would not elicit a comparable disclosure by the government. Petitioner may not compel disclosure

of the names of government witnesses, much less the nature of their testimony. *Yeargain* v. *United States,* 314 F. 2d 881 (9th Cir. 1963). Hence the government may, as it has here, successfully resist a motion for transfer upon a lesser showing than is required of petitioner to permit him to prevail on his motion.

Although it may be true that the decisions below do not condition petitioner's right to seek a transfer upon an actual forfeiture of his Fifth Amendment rights, this Court, pursuant to its supervisory authority over the administration of justice in the federal courts, should not sanction procedures under Fed. R. Crim. P. 21(b) which so nearly transgress that right and which require of petitioner such an unfair and unequal disclosure of the nature of his defense prior to trial. *Cf. McNabb* v. *United States,* 318 U.S. 332 (1943).

As has been demonstrated, respondent has employed an unreasonable and improper standard of judgment in denying petitioner's motion for transfer. The Court of Appeals chose, however, to affirm respondent's ruling as being not an abuse of discretion. But testing a decision for possible abuse of discretion presupposes that the lower court's judgment was exercised in accordance with permissible and proper standards. Where, however, erroneous or improper standards are employed by the trial court, the question of abuse of discretion is beside the point, and the decision under review must be reversed and returned to the trial court for the application of proper standards of judgment. *Golconda Mining Corp.* v. *Herlands,* 365 F. 2d 856 (2d Cir. 1966) (by implication); *Chicago, R.I. & P.R. Co.* v. *Igoe,* 212 F. 2d 378 (7th Cir. 1954); *Wiren* v. *Laws,* 194 F. 2d 873 (D.C. Cir. 1951).

Inasmuch as the respondent's denial of petitioner's motion for transfer was guided by an improper standard, the Court of Appeals was under an affirmative obligation to reject that standard and to remand the case to respondent after announcing proper standards for judgment. It was not at liberty to affirm respondent's decision as a sound exercise of discretion. *Platt* v. *Minnesota Mining & Mfg. Co.*, 376 U.S. 240 (1964). Chief Judge Bazelon (dissenting) would have remanded on the authority of *Platt*.

CONCLUSION

For the reasons advanced above, this petition should be granted in order to insure the sound and fair administration of criminal justice in the federal courts and more particularly to insure the use of proper standards of judgment in determining motions for transfer under Fed. R. Crim. P. 21(b).

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,951

CLIFFORD JONES, *Petitioner*

v.

HONORABLE OLIVER GASCH,
JUDGE OF THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA, *Respondent*

On Petition for Writ of Mandamus

Decided December 8, 1967

Mr. Edward P. Morgan, with whom *Mr. Gerald S. Rourke* was on the pleadings, for the petitioner.

Mr. William O. Bittman, of the bar of the Supreme Court of Illinois, *pro hac vice,* by special leave of court, for respondent. *Assistant Attorney General Fred M. Vinson, Jr.* and *Mr. Frank Q. Nebeker.* Assistant United States Attorney, entered appearances for respondent. *Miss Beatrice Rosenberg* and *Mr. Paul C. Summit,* Attorneys, Department of Justice, were on the pleadings for respondent.

Before BAZELON, *Chief Judge,* and WRIGHT and ROBINSON, *Circuit Judges.*

ROBINSON, *Circuit Judge:* On March 17, 1965, petitioner testified before a grand jury in the District of Columbia investigating the affairs of Robert G. Baker. In separate indictments returned on January 5, 1966, Baker was charged with several offenses, and petitioner was accused in three

counts of perjury allegedly committed in the course of his grand jury testimony.[1] On March 28, 1966, petitioner, invoking amended Rule 21(b) of the Federal Rules of Criminal Procedure[2] anticipatorily, moved for a transfer of his case to the District of Nevada,[3] wherein he resides,[4] or to

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[1] Count 9 of the Baker indictment named petitioner and Wayne L. Bromley as co-conspirators with Baker in an alleged scheme to falsify, for federal income tax purposes, the incomes of Baker and Bromley during 1963 and 1964, in part by causing First Western Financial Corporation, a Nevada corporation of which petitioner was an officer and director and in which he had a substantial stock interest, to make certain payments, represented by 12 checks, to Bromley as a conduit to Baker. Petitioner's indictment charged that he testified falsely when he told the grand jury that he had not caused any payments of that character to be made (count 1), when he denied having had any conversation in Bromley's presence wherein the payment of money to Baker was discussed (count 2), and when he stated that Bromley had been retained as a lawyer to perform services with respect to legislation and had furnished legislative materials to petitioner (count 3).

[2] The effective date of the amendment of F.R.Crim.P. 21(b) was July 1, 1966. The text of the rule appears in note 24, *infra*.

[3] For grounds the motion stated that "Rule 21(b), as amended, Federal Rules of Criminal Procedure, requires that the instant case be transferred for the convenience of the parties and witnesses and in the interest of justice," and that "[i]t is improbable that the defendant can be fairly tried in this jurisdiction by reason of prejudicial considerations stemming from the charges made in the indictment." When the motion was first presented, and prior to the 1966 amendment of F.R.Crim.P. 21(b), transfers pursuant to that rule could be made only to a district or division in which venue of the prosecution was proper. See note 15, *infra*. Since the offenses charged in petitioner's indictment were committed, if at all, only in the District of Columbia, the motion could not satisfy the multi-venue condition imposed by the rule in its then form. The amendment eliminated this requirement. See note 24, *infra*.

[4] Petitioner, a former Lieutenant Governor of Nevada, lives in Las Vegas and engages in law practice there. The record discloses, however, that he has interests elsewhere in the United States and abroad in connection with which he travels extensively.

some nearby district and, failing that, for a continuance to a date subsequent to Baker's trial. District (now Chief) Judge Curran denied the motion for transfer, without prejudice, for prematurity, and granted the continuance requested.

The Baker trial ended in a conviction on January 29, 1967, from which an appeal is pending. District Judge Gasch, the respondent here, on February 17, 1967, reheard and on April 11, 1967, denied the motion for transfer, elucidating his reasons in an unpublished opinion. Petitioner now seeks a writ of mandamus, asserting that Judge Gasch ignored a likelihood that prejudicial publicity may adversely affect a trial in the District of Columbia, and that his evaluation of the convenience of the parties and the witnesses, a dominant factor under amended Rule 21 (b), was "arbitrary and unfair." The order petitioner desires would either change the venue for trial or direct reconsideration of the motion in the light of criteria responsive to that rule.[5] We find these contentions unacceptable, and deny the petition.

Since our call to test the action on the motion by Rule 21(b) comes so close to its revision, we must apply its present provisions without the benefit of a background of prior

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[5] Petitioner seeks alternatively a direction for the grant of a further continuance, which was denied concomitantly with Judge Gasch's refusal to transfer, until completion of appellate proceedings in Baker's case. Petitioner contended in support of this request that count 9 of the Baker indictment is inconsistent with count 1 of his indictment, see *supra* note 1, and that Baker's conviction, if upheld, will exonerate petitioner on that count. Judge Gasch was "not persuaded" by this argument and saw "no useful purpose in further continuing this case which has already been in an active status for more than a year" in consequence of the continuance petitioner obtained earlier. We doubt seriously that mandamous is an available remedy to compel a continuance, see *Ex parte Wagner*, 249 U.S. 465, 471-72 (1919); *General Houses, Inc.* v. *Bruchhausen*, 256 F.2d 674 (2d Cir. 1958), and in any event perceive no abuse of discretion in this ruling.

judicial interpretation which more usually than not is available. We find, however, that our task is eased when the language of the new rule is consulted in the light of its evolution from the old. Thus our treatment of the issues confronting us has its beginning in history.

The Constitution ordains the trial of offenses against the United States in the state and district of alleged commission.[6] Surely in general operation "[t]he provision for trial in the vicinity of the crime is a safeguard against the unfairness and hardship involved when an accused is prosecuted in a remote place."[7] Yet, scarcely a generation ago, the geographical coincidence of the offense and prosecution left a great deal to be desired in particular instances. Although the Fifth Amendment secures the right to a fair trial,[8] and the Sixth the right to an impartial jury,[9] no method of removing the case was then available, even where prejudice in the locality of the crime made an unbiased verdict quite impossible.[10] And in consequence of spatial distribution of the elements of the offense, the Government

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[6] U.S. Const. art. III, § 2, cl. 3 provides that "[t]he Trial of all Crimes . . . shall be held in the State where the said Crimes shall have been committed." U.S. Const. amend. VI requires trial "by an impartial jury of the State and district wherein the crime shall have been committed."

[7] *United States* v. *Cores*, 356 U.S. 405, 407 (1958).

[8] *Thomas* v. *District of Columbia*, 67 App.D.C. 179, 183, 90 F.2d 424, 428 (1937); *Vandergrift* v. *United States*, 313 F.2d 93, 96 (9th Cir. 1963). See also *In re Murchison*, 349 U.S. 133, 136 (1955).

[9] *Singer* v. *United States*, 380 U.S. 24, 36 (1965); *Frazier* v. *United States*, 335 U.S. 497 (1948); *United States* v. *Wood*, 299 U.S. 123 (1936).

[10] Cummings, *The Third Great Adventure*, 29 A.B.A.J., 654, 655-56 (1943), quoted in Advisory Committee's Note ¶ 1 to F.R.Crim.P. 21 (original version), in turn quoted *infra* note 17.

was frequently presented a choice as to place of trial which almost uniformly was denied to the accused.[11]

The Criminal Rules, which became effective in 1947, implemented the constitutional mandates[12] but introduced a degree of flexibilty of which the accused might optionally avail.[13] Among the innovations were provisions for inter-or intra-district transfer on motion of the accused upon either of two dissimilar occasions. Rule 21(a) required a change of venue when community prejudice forestalled a fair trial locally.[14] Rule 21(b), in its original

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[11] "Plainly enough, such leeway not only opens the door to needless hardship to an accused by prosecution remote from home and from appropriate facilities for defense. It also leads to the appearance of abuses, if not to abuses, in the selection of what may be deemed a tribunal favorable to the prosecution." *United States* v. *Johnson,* 323 U.S. 273, 275 (1944).

We may, however, readily dispose of any notion that the Government, in instituting the instant prosecution in this jurisdiction, was exercising an option as to where the proceedings would occur. Venue in a perjury case lies properly only where the prejurious statement is supposed to have been made. The offenses with which petitioner is charged afforded the Government no choice, and no possibility to shop for a forum.

[12] "Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed." F.R.Crim.P. 18. Although this rule was amended in 1966, the provision quoted appears in both versions.

[13] F.R.Crim.P. 19 (original version) (intra-district transfers), rescinded effective July 1, 1966; F.R.Crim.P. 20 (original version) (inter-district transfers for plea and sentence); F.R.Crim.P. 21 (original version) (transfer from the district or division for trial). See also F.R.Crim.P. 18 (1966 amended version): "The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses."

[14] "The court upon motion of the defendant shall transfer the proceeding as to him to another district or division if the court is satisfied that there exists in the district or division where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial in that district or division." F.R.Crim.P. 21(a) (original version).

form, authorized removal when, but only when, an offense was committed in more than one district or division and the trial judge found that "in the interest of justice" the proceedings should be relocated to another district or division where venue could have been laid.[15] The constitutional rationale for these procedures was the accused's waiver, by his motion for the transfer, of his right to trial where the offense allegedly occurred.[16]

The objectives these provisions were designed to achieve are evident. Rule 21(a) was intended to rectify a deficiency in the law by affording the accused an opportunity to avoid provincial emotion so intense as to doom the objectivity of the trial.[17] Judicial constructions of the rule in

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[15] "The court upon motion of the defendant shall transfer the proceeding as to him to another district or division, if it appears from the indictment or information or from a bill of particulars that the offense was committed in more than one district or division and if the court is satisfied that in the interest of justice the proceeding should be transferred to another district or division in which the commission of the offense is charged." F.R.Crim.P. 21(b) (original version).

[16] "The rule provides for a change of venue only on defendant's motion and does not extend the same right to the prosecution, since the defendant has a constitutional right to a trial in the district where the offense was committed, Constitution of the United States, Article III, Sec. 2, Par. 3; Amendment VI. By making a motion for a change of venue, however, the defendant waives this constitutional right." Advisory Committee's Note ¶ 3 to F.R.Crim.P. 21 (original version).

[17] "This rule introduces an addition to existing law. 'Lawyers not thoroughly familiar with Federal practice are somewhat astounded to learn that they may not move for a change of venue, even if they are able to demonstrate that public feeling in the vicinity of the crime may render impossible a fair and impartial trial. This seems to be a defect in the federal law, which the proposed rules would cure.' Homer Cummings, 29 A.B.A.J. 655; Medalie, 4 Lawyers Guild R. (3) 1, 5." Advisory Committee's Note ¶ 1 to F.R.Crim. P. 21 (original version).

its original form attested both the high standard it set and the defendant's responsibility to meet it.[18] Rule 21(b) shifted from the Government to the court the discretionary exercise by whcih the choice of venue would finally be determined.[19] It exacted, too, a demonstration that in honoring the request for transfer the ends of justice would truly be served.[20]

Both sections of Rule 21 were amended in 1966. Through deletion of previous references to divisions,[21] transfers under Rule 21(a) are now confined to situations where the accused is able to demonstrate inability to obtain a fair and impartial trial anywhere the court might law-

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[18] *E.g., United States* v. *Carper*, 13 F.R.D. 483 (D.D.C. 1953); *United States* v. *Dioguardi*, 20 F.R.D. 33, 35-36 (S.D.N.Y. 1956); *United States* v. *Mesarosh*, 13 F.R.D. 180, 185-86 (W.D.Pa. 1952). See also Bailey & Golding, *Remedies for Prejudicial Publicity—Change of Venue and Continuance in Federal Criminal Procedure*, 18 Fed. B.J. 56 (1958), and cases cited therein.

[19] "The effect of this provision would be to modify the existing practice under which in such cases the Government has the final choice of the jurisdiction where the prosecution should be conducted. The matter will now be left in the discretion of the court." Advisory Committee's Note ¶ 2 to F.R.Crim.P. 21 (original version).

[20] See *Lindberg* v. *United States*, 363 F.2d 438 (9th Cir. 1966); *United States* v. *Luros*, 243 F.Supp. 160, 174 (N.D. Iowa), *extraodinary relief denied* (8th Cir.), *cert. denied* 382 U.S. 956 (1965); *United States* v. *United States Steel Corp.*, 233 F.Supp. 154, 156, 160 (S.D.N.Y. 1964).

[21] Conformably with a 1966 amendment to F.R.Crim.P. 18 eliminating division venue. The 1966 amended version of F.R.Crim.P. 18 is: "Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The Court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses."

fully sit within the district.[22] And the changes made in Rule 21(b) were much more substantial.

As previously stated Rule 21 in its original form authorized a transfer for reasons other than local prejudice only in multi-venue cases, and then only to a district or division in which venue was also proper. Irrespective of the degree of inconvenience incidental to trial where venue was exclusive, it was not possible to remove the case to a place in which no part of the offense was committed.[23] And in situations where a transfer was permitted, there was no assurance that it would run to the most convenient forum.

It was to avoid just such difficulties, and the harsh results sometimes occasioned, that Rule 21(b) was rewritten. The most significant change was the elimination of the multi-venue requirement; another was the restatement of the governing test.[24] Retaining "the interest of justice" and

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[22] "The defendant is given the right to a transfer only when he can show that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in the district. Transfers within the district to avoid prejudice will be within the power of the judge to fix the place of trial as provided in the amendments to Rule 18." "Advisory Committee's Note ¶ 1 to F.R.Crim.P. 21 (1966 amended version). The amendment also removed the obstacle encountered in *United States* v. *Parr*, 17 F.R.D. 512, 519 (S.D.Tex. 1955); see also *Parr* v. *United States*, 351 U.S. 513 (1956), by making plain the court's authority to select transferee district.

[23] In *Travis* v. *United States*, 364 U.S. 631 (1961), it was held that venue for trial of a violation of the National Labor Relations Act § 9(h), consisting in the execution in Colorado of a false affidavit and from there mailing it to the Board in Washington, D. C., lay exclusively in the District of Columbia, although all witnesses were located in Colorado.

[24] F.R.Crim.P. 21(b) (1966 amended version) provides: "For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to him or any one or more of the counts thereof to another district."

adding "the convenience of parties and witnesses," the 1966 amendment likened the standard in criminal cases to its civil counterpart.[25] With these criteria met, the court derived a discretion to transfer to any district, whether or not associated with the offense in any way.

But while the amendment makes transfer a possibility in far more cases through elimination of the venue precondition, it did not otherwise create an essentially new yardstick by which requests for removal are to be judged. No major enlargement of authority to transfer flows from the present specification of "the convenience of parties and witnesses," for that was an important factor in ascertaining "the interest of justice" under the original rule.[26] And we find nothing in the history or language of

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[25] "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a). It will be noted that civil cases may be transferred only to a district or division wherein jurisdiction and proper venue obtain. Hoffman 1. Blaski, 363 U.S. 335 (1960).

Cases holding that § 1404(a) confers a broader discretion to transfer civil cases than was traditionally available under the doctrine of *forum non conveniens* are inapposite to the problem here. They reflect merely the consideration that a lesser showing of inconvenience warrants a transfer than can justify a dismissal.

[26] In *Platt* v. *Minnesota Mining & Mfg. Co.*, 376 U.S. 240, 243-44 (1964), the Court assumed, without deciding, that in considering "the interest of justice," valid factors include "(1) location of corporate defendant; (2) location of possible witnesses; (3) location of events likely to be in issue; (4) location of documents and records likely to be involved; (5) disruption of defendant's business unless the case is transferred; (6) expense to the parties; (7) location of counsel; (8) relative accessibility of place of trial; (9) docket condition of each district or division involved; and (10) any other special elements which might affect the transfer."

Compare the listing in *United States* v. *Amador Casanas*, 233 F. Supp. 1001, 1003 (D.D.C. 1964): "[T]his Court must consider the rights of the Government, the accused, and the public; curtailment

the rule to indicate that "the interest of justice," independently of "the convenience of parties and witnesses," embraces more than its pre-amendment components.

II

Addressing petitioner's first contention, we note that, contrarily to the position taken initially,[27] he now concedes that the "prejudice" upon which the motion was partly premised is not of a type or degree as would preclude the drawing of an impartial jury for his trial in this jurisdiction. Nor, as his counsel with commendable candor admits, is it an existing bias, or one which will accrue other than vicariously through Baker. It is, rather, an aura which petitioner feels is likely to arise during the course of his trial, through unfavorable publicity he feels

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of unnecessary expense; relative cost to the parties involved; their possible embarrassment by reason of absence from their place of business for extended periods of time; length of time of the trial and the comparative condition of the dockets of both courts; and also the relative cost and hardship because of the removal of records into another jurisdiction."

[27] The earlier motion for continuance was predicated on the assertion that petitioner "will be gravely prejudiced should he be tried before Robert G. Baker and most certainly deprived of a critical witness to his defense." The memorandum supporting the motion identified Baker as the potential witness and, pointing to the connection between count 9 of the Baker indictment and count 1 of petitioner's indictment, see *supra* note 1, urged that publicity incidental to Baker's impending trial would be hurtful to petitioner. The last difficulty, the memorandum stated, would be dissipated in this fashion:

"At the expense of a cliche, however, nothing is so dead as yesterday's news. All experience suggests that, once Baker is tried, the last episode of public moment attending the multifarious charges that have been made concerning him, Robert G. Baker, will, relatively, cease to be 'news.' A subsequent trial of Jones (for matter already tried under Count Nine of the Baker indictment) can only be anticlimatic—a case of 'warmed-over biscuits.'"

will "inevitably attend" it because of its relationship to the Baker case, which may ultimately involve a sequestration of the jury. He insists that a showing insufficient under Rule 21(a), reliance upon which he disavows, commands respect under Rule 21(b), on which his motion for transfer rests.

Petitioner's bid is grounded on the charge that Judge Gasch gave "no consideration whatever" to this factor, a contention which in turn is based simply on the fact that the judge's opinion delineating his ruling does not mention the subject. We cannot accept this argument. Because the briefs and oral arguments presented to the judge in support of and in opposition to the motion were so largely directed to the matter, it would have been difficult indeed for him to have ignored the point. More importantly, to the extent that the situation remains ambiguous, we abide the presumption that argumentative submissions were suitably weighed.[28] And in any event, the claim of prejudice was not eligible for consideration under Rule 21(b).

We have pointed out that Rule 21(a) was promulgated to supply a method by which an accused victimized by strong community feeling might be relieved through a change of trial venue. The formulation of Rule 21(a) includes an explicit standard to be met in order that there may be a transfer on this account.[29] Rule 21(b), on the other hand, is devoted to an entirely different group of independently justified considerations which may support removal—those relating to "the convenience of parties and witnesses." Petitioner, however, would splice the two subdivisions by inclusion in "the interest of justice" pro-

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[28] *Fretz* v. *Stover*, 89 U.S. (22 Wall.) 198, 204 (1874); *Reynolds Spring Co.* v. *L. L. Young Indus., Inc.*, 101 F.2d 257, 261 (6th Cir. 1939); *Lahman* v. *Burnes Nat. Bank*, 20 F.2d 897, 899 (8th Cir. 1927).

[29] See notes 17, 21 and 22, *supra*.

vision of the present Rule 21(b) of circumstances relevant to but insufficient to sustain a Rule 21(a) motion.

We know of no basis upon which the pre-1966 Rule 21(b) could have been given that construction. And we have already expressed our view that the criteria for transfer under the old and the new Rule 21(b), except for the deletion of the multi-venue requirement, remain much the same. We have found no evidence that new Rule 21(b) was intended to expand radically the "interest of justice" standard which survived from the old; we have seen nothing to suggest that, although coupled with "the convenience of parties and witnesses," "the interest of justice" now embraces substantially more or less than it did before. It is clear to us that the amendment, rather, was designed to explicate a category of factors—pertinent only to the convenience of trial participants—which were already recognized as vitally involved in any determination as to the direction in which the ends of justice lay.[30]

Moreover, Rule 21 is to be construed in the light of past and contemporary practice respecting claims of local community prejudice. Transfer of the proceedings is but one method of combatting the evil once its existence has been definitely ascertained. A continuance of the trial, as once was done in petitioner's case on his motion, frequently avoids the need for transfer,[31] so also may the proceedings which occur on a Rule 21(a) motion preliminarily to its grant. "The ultimate question" on such a motion "is whether it is possible to select a fair and impartial jury, and the proper occasion for such a determination is upon the *voir dire* examination."[32] It is then, and

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[30] See note 26, *supra*, and related text.

[31] See *United States* v. *Dioguardi*, 147 F.Supp. 421 (S.D.N.Y. 1956).

[32] *Blumenfield* v. *United States*, 284 F.2d 46, 51 (8th Cir. 1960), *cert. denied* 365 U.S. 812 (1961).

more usually only then, that a fully adequate appraisal of the claim can be made, and it is then that it may be found that, despite earlier prognostications, removal of the trial is unnecessary. Jurors manifesting bias may be challenged for cause,[33] peremptory challenges may suffice to eliminate those whose state of mind is suspect.[34] Frequently the problem anticipated works itself out as responses by prospective jurors evaporate prior apprehensions.[35] These alternatives, which the mechanism of Rule 21(b)—transfer before trial begins—can ill accommodate, are preserved when indicia of community bias are scrutinized within the sphere of Rule 21(a).

In sum, we find nothing in the history or language of Rule 21 to indicate that circumstances relevant only to a motion to transfer on account of local prejudice which do not meet the test of Rule 21(a) are to be weighed under Rule 21(b). We are aware of no case adopting the novel theory urged by petitioner. We hold that the standard of Rule 21(a) is the exclusive gauge by which circumstances of that character are to be measured.

III

Petitioner's motion for transfer was also grounded on the claim that trial of the case in the District of Columbia would seriously incommode the rather large number of potential defense witnesses. He presented an affidavit designating 69 residents of Nevada and California, and giving their respective addresses and occupations. Of these, 29 were said to be "absolutely essential" to his defense on the merits, and

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[33] *Swain* v. *Alabama*, 380 U.S. 202, 220 (1965).

[34] *Id.* at 211-22. See also *United States* v. *Moran*, 236 F.2d 361, 362 (2d Cir.), *cert. denied* 352 U.S. 909 (1956).

[35] See *Black* v. *United States*, 122 U.S.App.D.C. 347, 350, 353 F.2d 885, 888 (1965), *vacated and remanded on other grounds*, 385 U.S. 26 (1966).

the remaining 40 to be available to avouch his reputation for truth and veracity.[36] The Government's response stated that it anticipated the use of 20 witnesses, of whom 13 reside in this area.

At the hearing, each side indicated in some degree the nature of the evidence witnesses on the merits were expected to furnish. Petitioner undertook a general showing on the materiality of the testimony of most of the witnesses named on his list. These included representatives of a Las Vegas savings and loan association,[37] executives of California savings and loan associations,[38] agents of the Federal

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[36] Among the 40 potential character witnesses are many political, business and religious leaders in Nevada. In the record are letters addressed to petitioner by 30 of the 40 attesting to the inconvenience they would incur in testifying at a trial here. Three of the 30 indicated that it would be impossible for them to appear in the District of Columbia; three more felt that they could not appear during 1966.

[37] Count 1 of the indictment charged falsity in petitioner's grand jury testimony that he had not caused any payments to be made by First Western Financial Corporation to Bromley for channeling to Baker. See note 1, *supra*. Petitioner's counsel told the judge that "[a]t least one half dozen officials of" First Western Savings and Loan Association, a subsidiary of First Western Financial, "are logical and proper witnesses."

[38] Petitioner's counsel stated that First Western "did not go along with the Baker . . . approach," and that petitioner's defense would involve the plausibility of what he and First Western did. It may become necessary, he said, "to call witnesses who were otherwise approached on the very same basis . . . and delineate their relevant facts which will most certainly establish plausibility of Mr. Jones' defense if not more." The Government, contesting relevance, contrasted petitioner's written motion, which stated that this testimony is important because of a widespread program for obtaining political contributions from savings and loan associations on the West Coast incidental to the November, 1962, congressional elections, with the indictment, which charges perjury as to allegedly conspiratorial activities occurring between April, 1963 and mid-1964.

Bureau of Investigation, employees of a Las Vegas telephone company[39] and others.[40] In a similar vein, the Government categorized the testimony it anticipated from its witnesses.[41] The presentations also embraced additional

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[39] Defense counsel stated at the hearing that "in due course" a motion to suppress Government evidence would be filed. There was electronic eavesdropping in the Baker case, he said, but "[i]n so far as that affects my client, it has not yet been explored" despite the fact that "we have reason to believe" that there had been similar surveillance of petitioner. He also referred to a Nevada civil suit against several representatives of a telephone company and agents of the Federal Bureau of Investigation in which the agents had claimed executive privilege and refused to testify. In this connection, "at least four agents" and "at least three representatives of the telephone company and probably others" will be required on the motion to suppress. The Government pointed out that the civil case had been pending for more than two years, thus antedating petitioner's indictment, and that no motion to suppress had been forthcoming although this prosecution had been pending for more than a year. We note from the record that no motion to suppress was filed until after the motion to transfer was submitted.

[40] Count 2 of the indictment charged that petitioner spoke falsely when he testified that he had not conversed in Bromley's presence about the payment of money to Baker. See note 1, *supra*. The Government contends that conversations on that subject occurred in hotels in Nevada, and petitioner says that "certain witnesses from some of the hotels" are necessary on this account. We can definitely identify two on petitioner's list as falling within that category.

[41] The Government's specification at the hearing approximates that in its opposition to the motion wherein it stated:

"The Government now represents to this court that in support of the instant indictment it intends to offer approximately 20 witnesses. Of this number, 13 are presently residing in the Washington, D. C. area.

"Of the thirteen local witnesses, at least four have direct knowledge of the *planning* and *purpose* of the underlying scheme by which it is alleged Jones caused money to be paid to Baker.

"Four other local witnesses will be called by the Government to identify and testify as to various documents which directly relate

circumstances competing for priority in the judicial assessment on the balance of convenience.[42]

In his resolution of the motion, Judge Gasch treated petitioner's Nevada residence as "a factor to be considered," but "not the controlling factor," deriving significance solely from its relationship to the convenience of witnesses, records and counsel.[43] Adverting to the merits witnesses

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to the *execution* of the alleged scheme by which Jones caused money to be paid to Baker.

"A local court reporter will be called to introduce the Grand Jury testimony of Clifford Jones which is the basis of this prosecution." (Emphasis in original.)

Apparently none of the Government's Witnesses is its employee.

[42] In large measure, these are referred to in Judge Gasch's opinion, summarized in the text.

[43] For this conclusion, which is not attacked here, Judge Gasch relied, very properly we think, on *Platt* v. *Minnesota Mining & Mfg. Co., supra* note 26, where the Court, speaking of a motion by a corporate defendant for a transfer under original Rule 21(b), said:

"The fact that Minnesota is the main office or 'home' of the [movant] has no independent significance in determining whether transfer to that district would be 'in the interest of justice,' although it may be considered with reference to such factors as the convenience of records, officers, personnel and counsel." 376 U.S. at 245-46.

While *Platt* involved a corporate defendant, we are unable to read out of its broad language those defendants who are natural persons. See *United States* v. *Ray*, 234 F.Supp. 371, 372 (D.D.C. 1964); *United States* v. *Cohen*, 35 F.R.D. 227, 232 (N.D.Cal. 1964); *United States* v. *Luros, supra* note 20, 243 F.Supp. at 174; *United States* v. *Jessup*, 38 F.R.D. 42, 44 (M.D.Tenn. 1965). We think, too, that the *Platt* holding survived the amendment of Rule 21(b). The deletion of the multi-venue requirement was designed, not to facilitate removal of the proceedings to the accused's home district simply for the sake of getting it there, but to serve "the convenience of parties and witnesses"; and the "interest of justice" standard, as we have said, remains about the same after the amendment as it did before.

listed by petitioner, he observed that "[n]owhere does the defendant disclose the nature of their expectd testimony nor does he provide an adequate basis to enable the Court to determine whether these individuals may even be properly classified as 'witnesses.'"[44] From "the limited disclosure made by the defendant" he had "some doubt whether these 29 individuals will all be necessary witnesses to matters of relevance for the defense." He felt that inconvenience to character witnesses was not so impressive a factor as the size of the group might suggest because of the court's discretion to reasonably limit their number.[45]

Moreover, as the judge pointed out in ruling, 13 of the Government's 20 prospective witnesses reside in this area, and all relevant books and records are located here. A transfer, he said, would necessitate the selection of new Government counsel, and a lag incidental to a fair opportunity for new counsel to become acquainted with the case and to prepare for trial. Conversely, the judge stated, "there is no adverse factor of delay in this district," and a definite trial date can be assigned as soon as the disposition of pretrial motions could be completed. In sum, he did "not feel that the defendant has demon-

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[44] See *Lindberg* v. *United States, supra* note 20.

[45] *Hauge* v. *United States,* 276 Fed. 111, 113 (9th Cir. 1921). See *Levin* v. *United States,* 119 U.S.App.D.C. 156, 164 n.13, 338 F.2d 265, 273 n.13 (1964), *cert. denied* 379 U.S. 999 (1965); *Burgman* v. *United States,* 88 U.S.App.D.C. 184, 188-89, 188 F.2d 637, 641-42, *cert. denied* 342 U.S. 838 (1951). *Cf. Manbeck* v. *Ostrowski,* No. 20,203 (D.C.Cir., July 28, 1967) at 4-5.

We are unwilling to assume, as the dissent apparently does, that Judge Gasch did not consider the convenience of character witnesses. His only specific reference was to the fact that petitioner claimed the availability of 40 such witnesses, and this occurred in the course of his enumeration of the factors on each side of "our 'balance sheet of convenience.'" To this we may add the discretionary function in which he was engaged, and the extraordinary nature of the remedy petitioner invokes here.

strated a sufficient balance of inconvenience to himself to warrant the removal" sought.

We do not discount the importance, in the decision of motions of this type; of constant vigilance to safeguard opportunities for full presentation of the defense,[46] nor do we lose sight of the value of character witnesses in perjury cases. But it is obvious that some amount of inconvenience—to Government or to petitioner, and perhaps to both—will inevitably accompany petitioner's trial, wherever it might occur. The judge's challenge was to strike the balance truly, and this, we know, is a task all too frequently so difficult and delicate that reasonable minds may plausibly differ on the result. Surely the Government's convenience as well as petitioner's was to be considered; no less certain it is that there was range to prefer testimonial quality over mere quantity.[47] Judge Gasch assigned to the individual factors in competition values we cannot characterize as irrational, and upon weighing them reached a conclusion we do not regard as farfetched. It is not for us to make the decision, which to him alone was confided,[48] and we are not persuaded that we should set his judgment in the matter for naught.

Motions for change of venue invoke "the sound discretion of the trial court," which "should not be overturned

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[46] Petitioner estimates the cost of bringing his witnesses to the District of Columbia at $10,000 to $15,000. We agree with the dissent (*infra* p. 23) that this is a factor favoring transfer. However, the record discloses that petitioner has extensive gambling interests in Nevada and the Caribbean, and petitioner makes no claim of inability to bear this expense.

[47] See *Lindberg* v. *United States, supra* note 20; *United States* v. *General Motors Corp.*, 194 F.Supp. 754, 756 (S.D.N.Y. 1961). Compare the civil holdings in *Glickenhaus* v. *Lytton Fin. Corp.*, 205 F.Supp. 102, 106 (D.Del. 1962) and *Berk* v. *Willys-Overland Motors, Inc.*, 107 F.Supp. 643, 644-45 (D.Del. 1952).

[48] *Platt* v. *Minnesota Mining & Mfg. Co., supra* note 26, 376 U.S. at 245.

where there is no clear showing of abuse."[49] And mandamus is an extraordinary remedy, " 'reserved for really extraordinary causes' "[50] and exercisable " 'then only to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' "[51] Only if the decision on transfer rests upon an improper factor,[52] or amounts to a plain abuse of discretion,[53] are we empowered to issue the writ. Appellant does not contend that any element foreign to the inquiry invaded the adjudicatory process,[54] and we find no perversion of the broad authority inherent in that function. We conclude that petitioner did not so plainly carry the day on "the convenience of parties and

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[49] *Estes* v. *United States*, 335 F.2d 609, 614 (5th Cir. 1964), *cert. denied* 379 U.S. 964 (1965). See also *Dennis* v. *United States*, 84 U.S.App.D.C. 31, 171 F.2d 986, 992 (1948), *aff'd* 339 U.S. 162 (1950); *United States* v. *Amador Casanas*, *supra* note 26; *Application of Cohn*, 332 F.2d 976 (2d Cir. 1964); *Koolish* v. *United States*, 340 F.2d 513, 527 (8th Cir.), *cert. denied* 381 U.S. 951 (1965).

[50] *Platt* v. *Minnesota Mining & Mfg. Co.*, *supra* note 26, 376 U.S. at 245, quoting *Ex parte Fahey*, 332 U.S. 258, 260 (1947).

[51] *Platt* v. *Minnesota Mining & Mfg. Co.*, *supra* note 26, 376 U.S. at 245, quoting *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943).

[52] *Platt* v. *Minnesota Mining & Mfg. Co.*, *supra* note 26, 376 U.S. at 244-45.

[53] *Application of Cohen*, *supra* note 49, 332 F.2d at 977; *Scott* v. *United States*, 255 F.2d 18, 20 (4th Cir.), *cert. denied* 357 U.S. 942 (1958); *Kott* v. *United States*, 163 F.2d 984, 987 (5th Cir. 1947), *cert. denied* 333 U.S. 837 (1948).

[54] True it is, as the dissent mentions (*infra* p. 21 n.1), that the Government improperly argued that it could not obtain a fair trial in Nevada. See *Platt* v. *Minnesota Mining & Mfg. Co.*, *supra* note 26, 376 U.S. at 246 (concurring opinion). But it does not appear that Judge Gasch treated it, and petitioner does not urge that he did.

witnesses'' and ''the interest of justice'' that relief by way of mandamus should now be afforded.

IV

We come lastly to the position of our dissenting brother that Judge Gasch was not at liberty to ''remain silent during petitioner's explicit offers to disclose the nature of his defense, and then deny the motion because disclosure had not been made.'' [55] We start, as we must, with a brief summary of the events giving rise to this observation.

Judge Gasch conducted a full hearing affording the litigants broad opportunities to support their respective positions, and there was no visible restraint upon the content of the presentations. Early in the proceeding, however, the judge made known his interest in general descriptions of the nature of the testimony which the prospective witnesses would give, ostensibly to enable sagacious decision of the motion. Near the beginning of his argument, petitioner's counsel represented that the defense ''may well require all of [its 29] witnesses to testify on the merits of this case,'' whereupon the judge inquired as to ''[w]hat, in general, would these witnesses testify?'' [56] Counsel then outlined[57] the testimony he anticipated.[58]

On his rebuttal argument, petitioner's counsel several times sought to meet the Government's strenuous challenge to the relevance of the contemplated defense testimonial

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[55] *Infra* p. 25-26.

[56] The judge later obtained similar information from counsel for the Government.

[57] Counsel's explanation of the testimony expected of his witnesses on the merits consumes four pages of the hearing transcript.

[58] Counsel's categorized outline is summarized in notes 37 to 40, *supra*.

proffer by representations, rather than more concrete demonstrations, that the testimony would be important. On one such occasion, the representation was coupled with an offer to do more if, but only if, the judge indicated that he wished him to:

> "Now, I have represented to the Court, and I repeat, as an officer of this Court, in my honest judgment, we will need the witnesses that we have represented we will need. Now, if that is not enough, and the Court feels that I should go on and delineate at great length what our defense is going to be, I shall be pleased to do it."

Somewhat later, the judge made an inquiry, admonishing "[n]ow, if I am asking an unfair question, kindly ignore it." Counsel nevertheless voiced an answer, expressing the "hope [that] I am not going to be required to go into the defense here," to which the judge responded "Oh, no." Counsel added: "But I represent to the Court in good faith it is an integral part of the defense and a fundamental part of the defense."[59]

A motion to change the venue of a criminal trial invokes an application of the governing criteria to the trenchant facts of the particular case. Rule 21(b) "permits a transfer in any case on motion of the defendant *on a showing* that it would be for the convenience of parties and witnesses, and in the interest of justice."[60] (Emphasis added) The process involves, not merely a choice between antagonistic assertions as to convenience and justice, but a sound determination by a judge. This responsibility can-

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[59] With this, we see no basis for the view expressed in the dissent (*infra* p. 26) that Judge Gasch may have overlooked the proffer to delineate the defense.

[60] Advisory Committee's Note ¶ 2 to F.R.Crim.P. 21 (1966 amended version).

not be abdicated to the appraisals of counsel, however earnestly constructed, or discharged by the simple expedient of counting the noses of the witnesses. On the other hand, the showing the motion summons the movant to make certainly does not, as the dissent suggests, require him "to disclose his defense." [61]

It is for the accused to make the showing,[62] and for the judge only to decree its sufficiency. We do not conceive the latter's obligation or function on a transfer motion, any more than at other stages of the litigation, to encompass dictation of the scope or depth of the accused's presentation, or periodic announcements as to how well his points have been scored. A venue motion is committed to the sound discretion of the trial judge. In ruling on the motion in this case, we think Judge Gasch conducted himself, affirmatively and negatively, within legitimate bounds, and that his action must be sustained. Certainly there is no abuse or discretion shown requiring the issuance of a writ of mandamus.

Petition denied.

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[61] *Infra* p. 24-25.

[62] See cases cited *supra* notes 18 and 20. See also *United States* v. *White*, 95 F.Supp. 544, 548 (D.Neb. 1951); *United States* v. *Olen*, 183 F.Supp. 212, 215 (S.D.N.Y. 1960).

BAZELON, *Chief Judge*, dissenting: Petitioner, a Nevada resident, gave testimony before a Grand Jury in the District of Columbia. He was subsequently indicted for perjury. Relying on Rule 21 of the Federal Rules of Criminal Procedure, petitioner sought a transfer of his trial to the District Court in Nevada or some other nearby district.[1] The District Judge declined to transfer the case. *United States* v. *Jones*, — F.Supp. — (D. D.C. 1967).

Petitioner's transfer motion was supported by an affidavit giving the names and addresses of twenty-nine persons all of whom are residents of Nevada or California and each of whom was alleged to be "absolutely essential . . . for the development of my defense upon the merits." Additionally, the affidavit set forth the names and addresses of forty potential character witnesses, including the Governor of Nevada, the Mayor and Chief of Police of Las Vegas, Nevada, and a Justice of Nevada's Supreme Court. Several of these character witnesses, including Nevada's Governor, submitted letters stating that a trial in Washington would be a severe inconvenience and might preclude their appearance. At oral argument before the District Judge, petitioner's counsel estimated that the cost of transporting these witnesses to Washington would be fifteen thousand dollars.

The Government opposed a transfer asserting, *inter alia*, that it would call twenty unidentified witnesses, thirteen of whom were District of Columbia residents.

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[1] In response to the Government's suggestion that it would not get a fair trial in Nevada—an argument which Mr. Justice Harlan has ruled "wholly out of bounds," *Platt* v. *Minnesota Mining & Mfg. Co.*, 376 U.S. 240, 246 (1964) (concurring opinion)—petitioner's counsel made it clear that he was not insisting on Nevada and that another nearby district, such as Arizona, California or Utah, would substantially ameliorate the inconvenience and expense of a Washington trial.

The District Judge dismissed petitioner's claim that "the convenience of the parties and witnesses, and . . . the interest of justice" required a transfer because petitioner had not "disclose[d] the nature of [the] expected testimony nor does he provide an adequate basis to enable the court to determine whether these individuals may even be properly classified as 'witnesses.'" — F.Supp. at —. Both in the District Court and here, petitioner has maintained that a criminal defendant is not required to disclose his defense in order to secure a transfer. Alternatively, however, his counsel represented:

> as an officer of this Court, in my honest judgment, [that] we will need the witnesses that we have represented we will need. *Now, if that is not enough, and the Court feels that I should go on and delineate at great length what our defense is going to be, I shall be pleased to do it.* (Emphasis added.)

With all respect, I am uncertain whether this court rules that (a) although petitioner's showing of the relevance and materiality of his witnesses may have been sufficient disclosure, denial of transfer was not an abuse of discretion (see Part III); or, (b) that petitioner's disclosure was insufficient in respects which are not specified. Since I dissent from either view, it is unnecessary for me to consider other issues reached by this court.

I

It seems clear from the District Court's opinion that it struck all of petitioner's 29 non-character witnesses from consideration because he had not overcome the court's "doubt whether these 29 individuals will all be necessary witnesses to matters of relevance for the defense." If furnishing the names, addresses and occupations of the witnesses together with "a general showing on the ma-

teriality of the testimony of most of the witnesses named" is sufficient, and I am inclined to think that it is, I suggest we are bound to remand with directions to apply this view. *Platt* v. *Minnesota Mining & Mfg. Co.*, 376 U.S. 240 (1964).

Moreover, I think the role of character witnesses is entitled to specific consideration in the balancing process. Of course, a trial court has broad discretion to limit the number of character witnesses that may be called. But I take it as settled that the court cannot prevent the defense from presenting a reasonable number of these witnesses, particularly in a perjury case where this testimony is of unusual importance. In this connection, it is reasonable to consider not only the expense and inconvenience of transporting character witnesses across the country, but the unavoidable dilution of their testimony which naturally attends trial in a distant location. *United States* v. *Johnson*, 323 U.S. 273, 279 (1944) (concurring opinion).

Finally, I question whether the Government's claim of countervailing inconvenience is supported by the record. The District Court relied on the Government's statement that it will call 20 witnesses to prove its case, 13 of whom are District of Columbia residents. But it appears that the presence of all may not be required:

> THE COURT: How many witnesses would the Government have?
>
> MR. BITTMAN: Approximately 20, and several of these relate only to documents. Some of the Las Vegas people will have to be called only to put in the vouchers and the checks relating to the First Western transaction.
>
> This probably could be disposed of by stipulation. The witnesses have already testified in the Baker case and the exhibits already entered in the Baker case.

> Another witness would be the Court reporter that transcribed Clifford Jones' grand jury testimony. The only witness of any length that I believe would testify would be Wayne Bromley.

On rebuttal, however, petitioner's counsel stated:

> Now, Mr. Bittman made a reference here to the fact that he had a great many witnesses that he could get through with in a great hurry, those who had formal matters to care for, like the reporter at the Grand Jury. That is no problem. I will stipulate with you on that.
>
> The records you talk about, the checks, I will stipulate with you on that. Sure the checks were issued, no question about it. If that will eliminate the great bulk of your witnesses, fine.
>
> About the only witness I heard him mention—and this comes as no surprise of course—was Mr. Wayne Bromley. I would concede the Government is going to have Mr. Wayne Bromley in connection with this case. If it is transferred, they might have to transport one witness out of the District of Columbia.

In sum, petitioner says he has a large number of California and Nevada residents who will testify; the Government says it has some "Las Vegas people" who will testify together with a number of District of Columbia residents; and the petitioner has offered to stipulate as to formal matters which may eliminate the bulk of the Government's District of Columbia witnesses. Since the District Court did not even mention this proffer in its carefully written effort to strike the "balance sheet of convenience," it is conceivable that the court inadvert-

ently overlooked the proffer.[2] I would, therefore, remand for reconsideration.

II

On the other hand, if the court believes the disclosure of name, address, occupation and a general showing of materiality is insufficient, I respectfully suggest that there is need to lay down the principles which require more.

Whatever may be the merit of incorporating the open disclosure contemplated by the civil rules, such a policy has not yet found its way into the criminal process[3] and, generally speaking, neither the prosecutor nor the defendant is required to disclose his case in advance of trial.[4] Whether, in order to prevail on a Rule 21 transfer motion, a defendant must disclose the nature of his defense is a question I find exceedingly difficult. On the one hand, it may fairly be argued that frivolous and dilatory transfer

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[2] The Government's opposition in this court, filed on behalf of the District Judge, stated: "As to the so-called offer to disclose testimony, government counsel does not recall such an offer nor does the opinion of the [district] court mention one." We are advised that the court reporter who transcribed the argument in the District Court was ill, and the transcript of that argument was not filed until the District Judge had prepared and filed his memorandum opinion.

[3] See generally, Brennan, *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 Wash. U.L.Q. 279; *Langrock, Vermont and Criminal Discovery*, 53 A.B.A.J. 732 (1967); *Louisell, Criminal Discovery: Dilemma Real or Apparent?* 49 Calif. L. Rev. 56 (1961); Traynor, *Ground Lost and Found in Criminal Discovery*, 39 N.Y.U.L. Rev. 228 (1964).

[4] See *United States* v. *Garsson*, 291 Fed. 646, 649 (S.D.N.Y. 1923) (L. Hand, J.) In this case, for example, the Government did not set forth the names or addresses of its witnesses in its opposition to petitioner's transfer motion. See 18 U.S.C. § 3432; *Dean* v. *United States*, 265 F.2d 544, 547 (8th Cir. 1959).

requests are deterred by a disclosure requirement.[5] On the other hand, a disclosure requirement, with its constitutional ramifications,[6] raises troublesome problems. A not dissimilar dilemma arose under Rule 17's requirement of "a satisfactory showing . . . that the presence of the witness is necessary to an adequate defense" before an indigent could obtain a subpoena. See *Greenwell* v. *United States,* 115 U.S.App.D.C. 44, 317 F.2d 108 (1963). That rule was amended for the express purpose of obviating these difficulties[7] to permit the defendant to make the necessary showing *ex parte.*

In any event, I do not think the District Court may remain silent during petitioner's explicit offers to disclose the nature of his defense,[8] and then deny the motion because disclosure had not been made. As I have said, the court's failure to even refer to these proffers in its written

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[5] *Lindberg* v. *United States,* 363 F.2d 438 (9th Cir. 1966), cited by the court, strikes me as such a case. There, the defendant "asserted that defense witnesses were located in the district to which transfer was sought, [but] the witnesses were not named or otherwise described and the nature of their testimony was not disclosed." *Id.* at 438-39.

[6] See Mr. Justice Douglas' Statement on the Amendment of the Federal Rules of Criminal Procedure, 86 S. Ct. 236 (1966).

[7] Advisory Committee's Notes to Rule 17, F.R.Crim.P.

[8] After several offers to disclose the nature of the defense had been made, counsel stated, "As I say, I hope I am not going to be required to go into the defense here," to which the judge replied, "Oh, no." While a trial judge need not make "periodic announcements as to how well [counsel's] points have been scored," this does not meet the need for clarifying the apparent conflict between the court's oral statement at trial that disclosure was not required and the court's subsequent written opinion that it was required.

opinion allows speculation that they were inadvertently overlooked.[9]

Petitioner is free to subpoena these witnesses to a Washington trial. But exercise of his right to compulsory process carries a price tag estimated at fifteen thousand dollars. Rule 21 seems to me designed to eliminate that type of expense and the resulting inconvenience to the witnesses. I fully agree that we are not at liberty to disturb the District Court's ruling simply because, had the discretion been ours, we might have exercised it differently. But we have a duty to ensure that the court applied "appropriate criteria" in exercising this discretion. *Platt* v. *Minnesota Mining & Mfg. Co., supra.* On the record before us I think that duty requires a remand for further proceedings.

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[9] The record shows that, in addition to trial witnesses, petitioner's counsel candidly told the District Judge that a motion to suppress evidence on the grounds of wiretapping would be filed by his client and that the testimony of certain F.B.I. agents would be required on the hearing of that motion. This, of course, explains the presence of F.B.I. agents on petitioner's witness list and I assume that the expense and necessity of summoning witnesses for a suppression hearing, no less than for a trial, is a factor properly to be considered in a transfer motion.

APPENDIX B(1)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1967

No. 20,951

Criminal 40-66

(Filed Nov 7 1967)

CLIFFORD JONES, *Petitioner*,

v.

HONORABLE OLIVER GASCH, Judge of the United States District Court for the District of Columbia, *Respondent*.

Before: Bazelon, Chief Judge; and Wright and Robinson, Circuit Judges.

Order

This cause came on for hearing on petitioner's petition for writ of mandamus.

Now upon consideration of the petition for writ of mandamus, respondent's opposition thereto and petitioner's reply and all the pleadings and proceedings had herein, it is

ORDERED by the Court that petitioner's petition for writ of mandamus is denied.

Per curiam.

Chief Judge Bazelon dissents from the foregoing order. Opinions in the above case will issue later.

APPENDIX B(2)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1967

No. 20,951

Criminal 40-66

(Filed Jan 31 1968)

CLIFFORD JONES, *Petitioner*,

v.

HONORABLE OLIVER GASCH, Judge of the United States District Court for the District of Columbia, *Respondent*.

Before: Bazelon, Chief Judge; and Danaher, Burger, Wright, McGowan, Tamm, Leventhal, and Robinson, Circuit Judges, in Chambers.

Order

On consideration of petitioner's petition for rehearing *en banc*, it is

ORDERED by the Court *en banc* that petitioner's aforesaid petition is denied.

Per Curiam.

Chief Judge Bazelon would grant petitioner's petition for rehearing *en banc*. Circuit Judge Danaher would deny petitioner's petition for rehearing *en banc* relying both on the majority opinion and on that of the Supreme Court in *Will* v. *United States*, 389 U.S. 90 (1967).

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Criminal No. 40-66

UNITED STATES OF AMERICA

v.

CLIFFORD JONES

Opinion

On January 5, 1966, the defendant Clifford Jones was indicted by a Federal Grand Jury sitting in the District of Columbia. The Grand Jury charged that the defendant had on three occasions committed perjury in his appearance before that body on March 17, 1965. At the request of counsel for the defense, the case was continued until after the trial in *United States* v. *Baker,* Criminal No. 39-66. Now that the trial in the "Baker" case has been completed, counsel for the defendant has moved for a further continuance and in the alternative for a transfer.

The defendant's motion for a continuance is predicated upon an alleged conflict between Count 9 of the "Baker" indictment and Count 1 of his own indictment. The defendant contends that these counts are conflicting in that they each charge the respective defendants with causing certain checks to be issued by the First Western Financial Corporation payable to Wayne L. Bromley. Apparently, the defendant is unwilling to accept the fact that a single act or series of acts may have a dual causation and feels that, in view of Baker's conviction, Count 1 of this indictment should be dismissed.

The Court is not persuaded by the defendant's argument and can see no useful purpose in further continuing this case which has already been in an inactive status for

more than a year. Accordingly, the motion for a continuance will be denied.

The defendant also seeks a transfer from this district to a district in Nevada pursuant to Rule 21(b), F.R. Crim. P., contending that a district court in Nevada will afford him a more convenient trial forum.

Amended Rule 21(b) became effective on July 1, 1966, and governs "all criminal proceedings thereafter commenced and so far as just and practical all proceedings then pending." H. R. Doc. 390, 89th Cong., 2d Sess., 11, 1966. There can be no question, therefore, that it is proper to apply the new rule to present proceeding. *Singleton* v. *Botkin,* 5 F.R.D. 173 (D.C.D.C. 1946).

Prior to amendment, Rule 21(b) permitted the Court on defendant's motion to transfer a case to another district in the "interest of justice" only when venue existed in both districts; that is, where the offense charged was alleged to have been committed in more than one district and venue would have initially been proper in either. However, as amended, Rule 21(b) is no longer tied to a "crime committed" formula and now provides:

> "For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding * * * to another district."

Thus, the amendment now permits a court to transfer any case on motion of the defendant upon "a showing that it would be for the convenience of parties and witnesses, and in the interest of justice."

Counsel have suggested that the instant case is one of first impression involving the interpretation and application of this new rule. It should be pointed out, however, that, although the multi-venue test has been eliminated as a prerequisite to transfer, the "interest of justice" standard which is incorporated in both the old and the

new rule has not been changed. Therefore, the proper application of Rule 21 must be determined from the language of the rule, the considerations which led to its amendment, and most importantly, from the previous judicial interpretations of the "interest of justice" standard.

Rule 21(b) was amended in an effort to alleviate some of the difficulties created by the strict constructionist approach adhered to by most courts when applying the rule prior to its amendment. *See*, e.g., *Travis* v. *United States*, 364 U.S. 631 (1961); *Johnston* v. *United States*, 351 U.S. 215 (1956); *Platt* v. *Minnesota Min. & Mfg. Co.*, 376 U.S. 240 (1963); *United States* v. *Choate*, 276 F.2d 724 (5th Cir. 1960); and *Advisory Committee's Notes*, F. R. Crim. P., H. R. Doc. No. 390, 89th Cong., 2d Sess., 11, 1966. It is apparent from the above-cited cases, and the Advisory Committee's Notes reflect, that the ills sought to be cured by amendment all had resulted from the multi-venue requirement of the old rule. Thus, in this case, the ill was cured by simply eliminating the requirement. However, the court has previously noted, and it should be emphasized, that the standards for determining when the "interest of justice" warrants a transfer remain unchanged.

In determining whether a prosecution should be transferred in the "interest of justice," the Court may consider:

> "* * * the rights of the Government, the accused, and the public; curtailment of unnecessary expense; relative cost to the parties involved; their possible embarrassment by reason of absence from their place of business for extended periods of time; length of time of the trial and the comparative condition of the dockets of both courts; and also the relative cost and hardship because of the removal of records into another jurisdiction."[1]

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[1] *United States* v. *Amador Casanas*, 233 F.Supp. 1001, 1003 (D.C.D.C. 1964). See also *Platt* v. *Minnesota Min. & Mfg. Co.*, 376 U.S. 240, 243-44 (1963).

However, before applying these factors to the present case, we must take as our starting point the preliminary proposition that sound judicial administration and the need for efficient handling of the prosecuting attorney's work load suggests that only rarely and for good cause should a prosecution be withdrawn by a judicial act from the court in which it was brought and probably from the direction and management of counsel who have prepared it. *United States* v. *Luros,* 243 F.Supp. 160 (W.D. Iowa 1965); *United States* v. *United States Steel Corp.,* 233 F.Supp. 154 (S.D.N.Y. 1964); and *United States* v. *White,* 95 F.Supp. 544 (D. Neb. 1951). This is especially true where, as in this case, government counsel has carried it before the grand jury. Accordingly, to warrant a transfer the defendant must demonstrate and the Court must be satisfied that the prosecution in the district where the indictment was properly returned will result in a substantial balance of inconvenience to himself. *United States* v. *Cohen,* 35 F.R.D. 227 (S.D. Calif. 1964); *United States* v. *Luros, supra,* and *United States* v. *United States Steel Corp., supra.* As Judge Carter said in *United States* v. *Cohen,* at 232:

> "In weighing and balancing the respective conveniences of the parties the Court should not grant the motion unless the factors involved indicate a balance of inconvenience of some substance to the defendant."

With these observations in mind, we now turn to the defendant's contentions in the present case.

The Court does not feel that the defendant has demonstrated a sufficient balance of inconvenience to himself to warrant the removal of this case to a district court in Nevada. It is true that the defendant is a resident of Las Vegas, Nevada. However, although the defendant's residence is a factor to be considered, it is not the con-

trolling factor. As the Supreme Court said in *Platt* v. *Minnesota Min. & Mfg. Co., supra,* at 245:

> "The fact that Minnesota is the main office or 'home' of the respondent has no independent significance in determining whether transfer to that district would be 'in the interest of justice,' although it may be considered with reference to such factors as the convenience of records, officers, personnel and counsel."

Furthermore, the defendant is the only party to this litigation who resides in Nevada. Government counsel are all residents of Washington, D. C., as is counsel for the defendant, Edward P. Morgan. Consequently, this district clearly provides the most convenient trial forum as far as all parties and counsel are concerned.

The defendant by affidavit attached to his pleadings asserts that he will need to call 29 witnesses, all of whom reside in and around Las Vegas, Nevada, to develop the merits of his defense. But a bare assertion that a large number of witnesses will be needed at trial is not sufficient to demonstrate the preponderance of inconvenience necessary to warrant a transfer. *Lindberg* v. *United States,* 363 F.2d 438 (9th Cir. 1966). Nowhere does the defendant disclose the nature of their expected testimony nor does he provide an adequate basis to enable the Court to determine whether these individuals may even be properly classified as "witnesses." In fact, the limited disclosure made by the defendant leaves the Court with some doubt whether these 29 individuals will all be necessary witnesses to matters of relevance for the defense. For example, the Court finds it difficult to comprehend how the testimony of four F.B.I. agents, eight Las Vegas telephone company employees, and six California savings and loan executives will be relevant to the issue underlying the perjury charge in this case, i.e., whether the defendant

caused certain monies to be paid to Wayne Bromley for Robert Baker.

The defendant also asserts that some 40 witnesses also living in and around the Las Vegas, Nevada, area, have expressed their desire to testify as to his reputation for truth and veracity, but that many of these "character" witnesses have stated that it would be inconvenient for them to travel to Washington, D. C. The fact that some 40 individuals are willing to testify as to the defendant's good character is not persuasive. It is well established that a trial judge may within his discretion limit the number of "character" witnesses called by a defendant and sound judicial management would suggest that he do so. As the Court said in *Hauge* v. *United States,* 276 Fed. 111 (1921), which was also a perjury case:

> "After six witnesses had testified to defendant's good reputation for truth and veracity, the court declined to permit defendant to call further witnesses upon the same point. Defendant excepted and assigns error in the action of the court. As the proposed additional witnesses would give evidence which was merely cumulative, the matter was one within the discretion of the court, and we cannot see that there was any prejudice by the ruling. O'Hara v. U.S., 129 Fed. 551, 64 C.C.A. 81; Chapa v. U.S. (C.C.A.) 261 Fed. 775." 276 Fed. at page 113.

The *Hauge* case was recently cited with approval by our Court of Appeals in *Levin* v. *United States,* 119 U.S.App. D.C. 156, 164, 338 F.2d 265, 273 (1964). And see, *Burgman* v. *United States,* 88 U.S.App.D.C. 184, 188-89, 188 F.2d 637, 641-42 (1951); *United States* v. *Baysek,* 212 F.2d 446 (1954); *Shaw* v. *United States,* 41 F.2d 26 (1930); and *Brady* v. *United States,* 41 F.2d 449 (1930).

On the other side of our "balance sheet of convenience," the Government asserts that, in addition to counsel, 13 of

its 20 prospective witnesses reside in the Washington, D. C., area;[2] that the offense was committed in the District of Columbia; and that the books and records which will be introduced in evidence by the Government are presently located in this district.

Further, there are other factors which militate against a transfer. A transfer to another district would require new Government counsel to enter the case which would result in an indefinite delay to afford new counsel a reasonable time to acquaint themselves with matters to date and for adequate trial preparation. On the other hand, there is no adverse factor of delay in this district. As soon as all the pretrial motions can be disposed of, the Court is prepared to fix a definite trial date.

The defendant relies primarily on *Travis* v. *United States*, 364 U.S. 631 (1961), but the *Travis* case is clearly distinguishable on its facts. There, the defendant was indicted and convicted in a Colorado district court for making and filing a false noncommunist affidavit as required by § 9(h) of the National Labor Relations Act. The Government's contention was that, although technically the affidavit was filed in the District of Columbia, since all of the acts underlying the transaction had occurred in Colorado and since the defendant as well as all of the witnesses lived in Colorado, venue should have been proper in Colorado. Despite the fact that Colorado clearly presented the most convenient forum, the Supreme Court rejected the Government's argument and held:

> "'Multiple venue in general requires crimes consisting of 'distinct parts' or involving 'a continuously moving act.' United States v. Lombardo, 241 U.S. 73, 77.

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[2] The court must consider the convenience of the witnesses for the Government as well as those for the defense. *United States* v. *Tellier*, 19 F.R.D. 164 (1956).

When a place is explicitly designated where a paper must be filed, a prosecution for failure to file lies only at that place. Id., at 76-78."[3]

In the instant case, the offense charged was committed in the District of Columbia; both defense counsel and counsel for the Government reside in the District of Columbia; the consummation of the scheme which it is alleged the defendant concealed from the Grand Jury was accomplished in the District of Columbia; and most of the Government's prospective witnesses also reside in the District of Columbia.

For these reasons and upon consideration of the entire record presented on this motion, the Court concludes that the defendant has failed to demonstrate that the "interest of justice" would best be served by transfer to another district. Accordingly, the motion for transfer will be denied.

OLIVER GASCH
Judge

April 11, 1967.

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[3] 364 U.S. at 636.

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No. 1187

In the Supreme Court of the United States

OCTOBER TERM, 1967

CLIFFORD JONES, PETITIONER

v.

HONORABLE OLIVER GASCH, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A) and of the district court (Pet. App. C) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 1967. A petition for rehearing was denied on January 31, 1968. The petition for a writ

of certiorari was filed on March 1, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals should have issued a writ of mandamus to compel transfer of petitioner's trial for perjury to his home state.

RULE INVOLVED

Federal Rule of Criminal Procedure 21(b), effective July 1, 1966, provides:

> For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceedings as to him or any one or more counts thereof to another district.

STATEMENT

Petitioner was indicted in the District of Columbia on January 5, 1966, in three counts charging him with perjury committed during his March 1965 testimony before a District of Columbia grand jury investigating the affairs of Robert G. Baker. The perjury related to a scheme to conceal the true nature of payments by petitioner's corporation (First Western Financial Corp.) to Baker by having the checks from First Western made payable to Wayne Bromley rather than Baker.[1] Petitioner was charged in the per-

[1] This scheme formed the basis of count nine of the indictment of Baker which was returned the same day as the indict-

jury indictment with having falsely told the grand jury (1) that he had not made payments of the kind described, (2) that he had not had a conversation discussing the payment of money to Baker in Bromley's presence and (3) that Bromley had been retained by petitioner as a lawyer and had furnished legislative materials to him.

On March 28, 1966, petitioner moved for a transfer of his trial to Nevada where he resides [2] and for a continuance of his trial to a date subsequent to Baker's. District Judge Curran denied the transfer motion as premature [3] but granted the continuance. On February 17, 1967, following Baker's conviction (appeal from which is presently pending in the court of appeals), a hearing was held on petitioner's renewed transfer motion before Judge Gasch, who had presided at the Baker trial. On April 11, 1967, the judge denied the motion (Pet. App. C). Petitioner's subsequent petition in the court of appeals for a writ of mandamus to compel the granting or reconsideration of the transfer motion was denied by that court, Chief Judge Bazelon dissenting (Pet. App. A). A petition

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ment herein. That count charged that Baker conspired with petitioner and Bromley (who were named as co-conspirators but not defendants) to falsify the incomes of Baker and Bromley for federal income tax purposes.

[2] Petitioner, a former Lieutenant Governor of Nevada, lives in Las Vegas but travels extensively in this country and abroad in connection with business interests.

[3] Federal Rule of Criminal Procedure 21(b), then in effect did not permit transfer, since there was no other district where the prosecution could have been brought, and the Rule permitted transfer only to a district of proper venue.

for rehearing *en banc* was denied *per curiam*, Chief Judge Bazelon dissenting (Pet. App. B(2)).

Petitioner's argument here is centered on his allegations with respect to convenience of parties and witnesses.[4] In an affidavit filed in support of the transfer motion and at the argument of the motion, counsel for petitioner represented that forty character witnesses, living in Nevada, were prepared to testify for petitioner at trial[5] and that another twenty-nine witnesses, also residents of Nevada (whose names, address and occupations were set forth), were necessary to the defense[6] (see H.Tr. 6-7;[7] Pet. App. A, 13-14). In response to the court's inquiry as to the nature of the testimony these twenty-nine witnesses would give, petioner's counsel asserted that at least six of the witnesses were officials of First Western Savings and Loan Association (a subsidiary of First Western Financial Corp.), who were "logical and proper witnesses" in view of the charge against petitioner that

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[4] In the district court and in the court of appeals petitioner argued as one reason for the transfer in the interest of justice an aura of unfavorable publicity that he said would attend his trial because of its relation to the Baker case. That claim is not pressed here.

[5] Of these forty persons, whose names, addresses and occupations were listed, thirty indicated in accompanying letters that it would inconvenience them to appear in the District of Columbia. Three more indicated that appearance would be impossible during 1966 (see Pet. App. A, 14, n. 36).

[6] The cost of transporting all the witnesses to the District of Columbia was estimated at $15,000 (see H.Tr. 53).

[7] "H.Tr." refers to the transcript of the hearing before Judge Gasch, a copy of which is on file with the Clerk of this Court.

he caused checks to be issued by First Western Financial Corp. to Bromley for Baker (H. Tr. 8). Certain witnesses from hotels in Nevada were said to be necessary because it was charged that a conversation between Bromley and petitioner in regard to the payments to Baker had taken place in the Thunderbird Hotel in Nevada (H. Tr. 8).[8] In addition, counsel indicated that petitioner's defense would be predicated to a large extent upon "establishing the plausibility" of what he and First Western Savings and Loan Association had done, in light of the fact that there was a widespread program for obtaining political contributions from savings and loan associations on the West Coast incidental to the 1962 congressional elections. Counsel represented that he thought it would be necessary to call witnesses from other savings and loan associations, "all of whom live on the West Coast", who have been approached "on the very same basis" (H. Tr. 8-9; Pet. App. A, 14, n. 38). Finally, defense counsel told the court that "in due course" a motion to suppress evidence, on the ground that electronic surveillance of petitioner had occurred, would be filed and that at least four F.B.I. agents and three representatives of the telephone company would be required as witnesses (H. Tr. 9-10). Counsel stated that the electronic eavesdropping claim had "evolved as a result of a civil suit that was on file in . . . . Nevada against the telephone company [and] named F.B.I. agents" (H. Tr. 10).

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[8] The majority below was able to "definitely identify two [witnesses] on petitioner's list as falling within that category" (Pet. App. A, 15; n. 40).

The government represented that it intended to call approximately twenty witnesses, of whom thirteen or fourteen reside in Washington, D.C. metropolitan area. At least four of the local witnesses were represented to have direct knowledge of the planning and purpose of the underlying conspiracy between petitioner, Bromley and Baker; four others would be called to testify about, and to identify, various documents relating to the execution of the conspiracy; and the local court reporter would have to be called to introduce the grand jury testimony of petitioner (see Pet. App. A, 15-16, n. 41; H. Tr. 36, 43).[9] None of the government's prospective witnesses was a government employee. In addition, the government pointed out that all counsel resided in the Washington, D.C. area; that the offense could be charged only in the District of Columbia; and that all of the records were located in the District of Columbia (see H. Tr. 30-31, 43). With regard to the claim of the defense that witnesses were necessary to show the widespread program to obtain political contributions from west coast lending institutions in connection with the 1962 elections, the government pointed out that the charges against petitioner referred to conspiratorial activities occurring between April 1963 and mid-1964 (H. Tr. 32-33). As to the

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[9] Government counsel advised the court that some Las Vegas witnesses would have to be called to put in the vouchers and checks relating to the First Western transaction, and he expressed a willingness to settle the matter by stipulation (H. Tr. 36). Defense counsel later stated that he would stipulate with respect to the vouchers and checks and he indicated a willingness to do the same as regards the court reporter's testimony (H. Tr. 48).

proposed motion to suppress, the government noted that the Nevada civil suit referred to by defense counsel had been pending for two years, but that no motion to suppress evidence on the basis of alleged electronic eavesdropping had yet been filed (H. Tr. 34-35).[10]

In denying the motion to transfer, the trial judge considered the fact that the majority of the government's witnesses resided in the District of Columbia, as did all counsel; that the records to be introduced were located in the District; and that the offense was committed in the District of Columbia alone. The judge indicated that the fact that petitioner resided in Nevada was a factor to be considered but was not controlling under *Platt* v. *Minnesota Mining & Mfg. Co.*, 376 U.S. 240, and that "sound judicial management would suggest" that the number of petitioner's character witnesses be limited (Pet. App. C, 35-37). With regard to the twenty-nine witnesses alleged to be necessary to the defense, the court stated (Pet. App. C, 36):

> [A] bare assertion that a large number of witnesses will be needed at trial is not sufficient to demonstrate the preponderance of inconvenience necessary to warrant a transfer. [citation omitted.] Nowhere does the defendant disclose the nature of their expected testimony nor does he provide an adequate basis to enable the Court to determine whether these [29] individuals may even be properly classified as "witnesses". In fact,

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[10] Such a motion was filed by petitioner prior to the decision below (see Pet. App. A, 15, n. 39).

> the limited disclosure made by the defendant leaves the Court with some doubt whether these 29 individuals will all be necessary witnesses to matters of relevance for the defense. * * *

ARGUMENT

The writ of mandamus sought by petitioner was properly denied by the court below. It is well settled that mandamus is an appropriate remedy only in extraordinary circumstances—where it appears that the lower court has acted outside its prescribed jurisdiction, has refused to exercise its authority when it has a duty to do so, or has grossly abused its discretion. *E.g.*, *Will* v. *United States*, 389 U.S. 90, 95-96; *Parr* v. *United States*, 351 U.S. 513, 520; *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, 382-383; *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 26. Here, such a showing cannot be made. The factors taken into consideration by the judge in denying the transfer motion were appropriate, and the conclusion reached therefrom, on the basis of the presentations by the parties, was not inconsistent with the exercise of a reasonable discretion. Compare *Platt* v. *Minnesota Mining & Mfg. Co.*, 376 U.S. 240.

The charges in this case are limited in scope—whether petitioner lied to a grand jury of the District of Columbia when he denied that payments made to Bromley were intended for Baker and denied discussing the arrangement in Bromley's presence. Only this latter conversation was alleged to have taken place in Nevada. Witnesses from Nevada as to the fact of payment to Bromley by First Western would, as the government represented, necessarily be part of

the government's case. In these circumstances, it was reasonable for the trial judge to seek some clue as to why it would be necessary for the defense to call 29 witnesses from the West, aside from character witnesses. The judge was not, as petitioner contends, requiring that the defendant reveal his defense as a prerequisite to having the convenience of defense witnesses considered. Rather, the judge was merely making a proper inquiry into the relevancy of the testimony of the various witnesses for whose convenience the defense was seeking to transfer the case out of the district where the crime was committed and where the case should normally be tried. See *Lindberg* v. *United States*, 363 F.2d 438 (C.A. 9). The Rule (F.R.Cr.P. 21(b)) permitting transfer obligates the defendant to demonstrate to a substantial degree that the convenience of parties and witnesses and the interest of justice will be served by transfer once an indictment is returned in a district of proper venue. See *United States* v. *Cohen*, 35 F.R.D. 227, 232 (N.D. Calif.); *United States* v. *Luros*, 243 F.Supp. 160, 174 (N.D Iowa), certiorari denied, 382 U.S. 956; *United States* v. *United States Steel Corp.*, 233 F.Supp. 154, 157 (S.D.N.Y.); cf. Notes of Advisory Committee on Rules in 18 U.S.C.A. F.R. Crim.P. 1-31, 1967 Cum. Supp. p. 206, par. 2.

Representations by counsel as to the number of witnesses required, even where the witnesses are named and their occupations given, will not always be sufficient to establish the relevancy of testimony. Petitioner's assertion (Pet. 6) that Judge Gasch, "in weighing the convenience of the witnesses, effectively credit-

ed petitioner with no (zero) witnesses," is refuted by the court's opinion. The court stated (Pet. App. C, 36): "[T]he limited disclosure made by the defendant leaves the Court with some doubt whether these 29 individuals will *all* be necessary witnesses to matters of relevance for the defense" (emphasis supplied). The judge then went on to indicate his inability to comprehend the relevance of testimony by "four F.B.I. agents, eight Las Vegas telephone company employees, and six California savings and loan executives". (Pet. App. C, 36). The judge's difficulty in this respect is understandable in view of the fact that the validity, or even "plausibility", of the arrangements made by petitioner was not an issue in the case; the only issue was whether petitioner lied about the arrangements which he made with Bromley and Baker. The district judge's finding that petitioner failed to make an adequate showing of the relevance of witnesses' testimony was not based on the lack of specificity of the disclosures made by petitioner's counsel but on the irrelevance of the theory that they were supposed to sustain.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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PETITIONER'S

REPLY

BRIEF

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IN THE

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OCTOBER TERM, 1967

CLIFFORD JONES, *Petitioner,*

v.

HONORABLE OLIVER GASCH, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, *Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

REPLY STATEMENT

The respondent's formulation of the question presented and his statement of facts requires of petitioner some further exposition of the facts in order that this Court may proceed from an accurate and balanced portrayal of the record. Respondent puts the question this way:

> "Whether the court of appeals should have issued a writ of mandamus to compel transfer of petitioner's trial for perjury *to his home state.*" (R. Br. 2[1]) (Emphasis added.)

Petitioner has not, however, insisted that the trial be held in his home state. He has requested only that the trial be held somewhere in the West—Los Angeles, Phoenix, Salt Lake City or Las Vegas—so that he and his witnesses will not be put to the inconvenience and expense of traveling 2,500 miles for trial in the District of Columbia. (H. Tr. 21-22, 53-54[2]).

Petitioner offered to stipulate with respect to a number of formal matters such as verification of checks and vouchers and the testimony of the court reporter who transcribed petitioner's grand jury testimony to the end of materially reducing the number of the government's District of Columbia witnesses (H. Tr. 48; see Chief Judge Bazelon's dissent: Pet. App. A, 25-26).

At the hearing before respondent on February 17, 1967, counsel for petitioner represented to the court that a motion to suppress evidence on the ground of electronic eavesdropping would be filed and that the testimony of F.B.I. agents and telephone company employees would be required in connection with the motion (H. Tr. 9-10). The motion to suppress was filed on March 1, 1967. Respondent's opinion denying petitioner's motion for transfer issued on April 11, 1967. As to the legitimacy of claiming the convenience

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[1] "R. Br." refers to the "Brief For The Respondent In Opposition."

[2] "H. Tr." refers to the transcript of the hearing before Judge Gasch, a copy of which is on the file with the Clerk of this Court.

of F.B.I. agents on the motion for transfer, Chief Judge Bazelon, dissenting, observed:

> "The record shows that, in addition to trial witnesses, petitioner's counsel candidly told the District Judge that a motion to suppress evidence on the grounds of wiretapping would be filed by his client and that the testimony of certain F.B.I. agents would be required on the hearing of that motion. This, of course, explains the presence of F.B.I. agents on petitioner's witness list and *I assume that the expense and necessity of summoning witnesses for a suppression hearing, no less than for a trial, is a factor properly to be considered in a transfer motion.*" (Pet. App. A, 29, n. 9) (Emphasis added.)

The same reasoning applies perforce to the presence of the names of telephone company employees on petitioner's witness list.

The flavor of respondent's brief is that this proceeding somehow concerns a conspiracy hatched in the District of Columbia and, therefore, particularly repugnant to this jurisdiction. But this is not a conspiracy case; it is a three-count perjury case and the events about which perjured testimony is alleged to have been given occurred in Nevada.

ARGUMENT

The thrust of respondent's argument is that the denial of petitioner's motion for transfer was a decision reached within the ambit of matters committed to the court's discretion and that it was a sound decision at that. For this proposition respondent relies on cases standing for the comfortably broad principle that mandamus is an appropriate remedy only in extraordinary circumstances—where it appears that

the lower court has acted outside its prescribed jurisdiction, has refused to exercise its authority when it has a duty to do so, or has grossly abused its discretion, citing *Will* v. *United States,* 389 U.S. 90 (1967); *Parr* v. *United States,* 351 U.S. 513 (1956); *Bankers Life & Cas. Co.* v. *Holland,* 346 U.S. 379 (1953); *Roche* v. *Evaporated Milk Ass'n,* 319 U.S. 21 (1943). In short, it is argued that respondent did nothing extraordinary in denying petitioner's motion for transfer.

Of the cases cited in the preceding paragraph, only the *Holland* case concerns the appropriateness of mandamus to review the disposition of a motion for transfer and there the petitioner-plaintiff sought mandamus to vacate an order *granting* the severance and transfer of the trial of one of several defendants. But in cases involving the *grant* of a motion for transfer, the review of such action on a petition for mandamus is more restricted than where transfer has been *denied. Ackert* v. *Bryan,* 299 F. 2d 65 (2d Cir. 1962). Moreover, it is unquestionably the law that a petition for a writ of mandamus is the pre-eminently appropriate procedure for seeking review of the denial of a motion for transfer. *Akers* v. *Norfolk and W. Ry.,* 378 F. 2d 78 (4th Cir. 1967); *General Tire & Rubber Co.* v. *Watkins,* 373 F. 2d 361 (4th Cir. 1967); *Golconda Mining Corp.* v. *Herlands,* 365 F. 2d 856 (2d Cir. 1966); *A. Olinick & Sons* v. *Dempster Bros., Inc.,* 365 F. 2d 439 (2d Cir. 1966). What is more important, however, is that the denial of petitioner's motion for transfer is an event sufficiently extraordinary to warrant mandamus. *Ford Motor Co.* v. *Ryan,* 182 F. 2d 329 (2d Cir.), *cert. denied,* 340 U.S. 851 (1950). Judge Frank reasoned as follows (182 F. 2d at 330):

> "Judge Hand and I think this the kind of interlocutory order with which this court can properly

> deal by way of such a writ [mandamus], *since should petitioners—the defendants—finally lose on the merits below, any error in the interlocutory order would probably be incorrectible on appeal, for petitioners could hardly show that a different result would have been reached had the suit been transferred.* * * * We recognize that the dividing line is by no means entirely clear between the power of this court and its lack of power to issue the writ. [footnote omitted] But we think this a sufficiently 'extraordinary cause'[4] to empower us to do so, *if the district judge erred.* [Emphasis added.]
>
> [4] *Ex parte Fahey*, 332 U. S. 258, 260, 67 S. Ct. 1558, 1559, 91 L. Ed. 2041."

Accord, Shurin v. *United States*, 164 F. 2d 566, 570 (4th Cir. 1947), *cert. denied*, 333 U.S. 837 (1948); *see Lindberg* v. *United States*, 363 F. 2d 438 (9th Cir. 1966).

In the case at bar, respondent has most certainly erred by employing an irrelevant and improper standard of judgment in denying petitioner's motion for transfer[3]—a standard which required petitioner to elect to forego his right to remain silent as a defendant in a criminal proceeding in order that he might have the convenience of his witnesses weighed. [Even had he made the disclosure required by respondent (discussed in this and succeeding paragraphs) there is no assurance that his motion for transfer would have been granted.] As to witnesses on the merits, respondent de-

[3] *Golconda Mining Corp.* v. *Herlands*, 365 F. 2d 856 (2d Cir. 1966) (by implication); *Ex parte Chas. Pfizer & Co.*, 225 F. 2d 720 (5th Cir. 1955) (dictum); *Chicago, R.I. & P.R. Co.* v. *Igoe*, 212 F. 2d 378 (7th Cir. 1954); *Wiren* v. *Laws*, 194 F. 2d 873 (D. C. Cir. 1951).

clined to consider the convenience of such witnesses and denied the motion for transfer because petitioner failed to demonstrate that such witnesses were *necessary* to his defense (Pet. App. C, 36). How does one demonstrate the "necessity" of witnesses without a thorough revelation of the theory and substance of their testimony? It simply cannot be done. In any event, petitioner, as the defendant in a criminal proceeding, may not properly be required to definitively enumerate and disclose the names of his witnesses and the nature of their testimony well in advance of trial. The proper inquiry is directed to the location of "possible"[4] or "potential"[5] or "probable"[6] witnesses. The impropriety of the disclosure required by respondent has been the subject of recent discussion by a trial court:

> "The Government has, by virtue of the charges leveled at the defendants, made an issue both as to their character and their way of life. It would not be in the interest of justice under such circumstances to place a burden on the defendants' ability to introduce evidence and witnesses to rebut such contentions. They are, in the last analysis, presumed to be innocent of the charges. *They should not be forced to anticipate—certainly at this early stage—the course of the litigation which will undoubtedly be protracted, and to identify specifically the individuals they intend to call as witnesses. The statement by defendant Jessup in this regard is sufficient to establish that numerous residents of the Gulfport-Biloxi area will be called to testify, and that these persons will make up the great bulk of the witnesses for the defense.*

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[4] *Platt* v. *Minnesota Mining & Mfg. Co.*, 376 U.S. 240, 244 (1964).

[5] *United States* v. *Kimball Securities, Inc.*, 25 F.R.D. 172, 174 (S.D.N.Y. 1960).

[6] *United States* v. *White*, 95 F. Supp. 544, 551 (D. Neb. 1951).

"The Government further attacks defendants' assertions that they are men of moderate financial means, and that for this reason the expense involved in coming to Nashville for trial would be a burden on them. In their affidavits the defendants contend that they are of moderate financial means. For the purpose of deciding on this motion, it seems to be elementary that their financial means would not be a controlling factor. Surely the Government does not contend that Rule 21(b) was only intended to benefit the poor. It seems to the Court that the clear import of the term 'interest of justice' as it applies to financial expenditures by movant defendants is that it would be in the interest of justice to transfer an action if the expense to be incurred by the defendants if the action were not transferred is considerably greater or more burdensome than the expense which would be necessary if the action were transferred. And this is true whether the defendant be rich or poor. It should not be necessary that a defendant show poverty, or refrain from hiring the best counsel he can obtain, or refrain from conducting such investigations as he can afford, in order to be able to take advantage of this rule. And, taking this as the test, it is clear that by establishing the need for transporting from defendants' home district between 65 and 80 persons some 560 miles the defendants have established a considerable financial burden incident to a trial in this district."[7] (Emphasis added.)

Respondent denied petitioner's motion for transfer despite the fact that petitioner disclosed the names, addresses and occupations of potential defense witnesses and "indicated in some degree the nature of the evidence witnesses on the merits were expected to furnish . . . [and] undertook a general showing on the materiality of the testimony of most of the witnesses

[7] *United States* v. *Jessup*, 38 F.R.D. 42, 46-47 (M.D. Tenn. 1965).

named on his list." (Pet. App. A, 14) Thus, it is unmistakable that respondent intended to require, and did require, more than just a clue to the relevancy of the testimony of petitioner's potential witnesses (R. Br. 9); he required a demonstration of the necessity of each and every witness on the merits and such a demonstration is impossible without revealing the entire mosaic of petitioner's defense and the place of each witness in it. It is equally unmistakable that for failure to make such a disclosure, respondent considered none of petitioner's witnesses on the merits in weighing the convenience of witnesses. In his dissent, Chief Judge Bazelon observed as much (Pet. App. A, 22):

> "It seems clear from the District Court's opinion that it struck all of petitioner's 29 non-character witnesses from consideration because he had not overcome the court's 'doubt whether these 29 individuals will all be necessary witnesses to matters of relevance for the defense.' If furnishing the names, addresses and occupations of the witnesses together with 'a general showing on the materiality of the testimony of most of the witnesses named' is sufficient, and I am inclined to think that it is, I suggest we are bound to remand with directions to apply this view. *Platt* v. *Minnesota Mining & Mfg. Co.*, 376 U.S. 240 (1964)."

Respondent's brief in opposition does not touch the subject of petitioner's character witnesses except to observe that "'sound judicial management would suggest' that the number of petitioner's character witnesses be limited. . . ." (R. Br. 7). This, of course, does not come to grips with the problem, for surely petitioner is entitled to *some* character witnesses. Chief Judge Bazelon again put his finger on the deficiency of respondent's decision (Pet. App. A, 25):

> "Moreover, I think the role of character witnesses is entitled to specific consideration in the balancing process. Of course, a trial court has broad discretion to limit the number of character witnesses that may be called. But I take it as settled that the court cannot prevent the defense from presenting a reasonable number of these witnesses, particularly in a perjury case where this testimony is of unusual importance. In this connection, it is reasonable to consider not only the expense and inconvenience of transporting character witnesses across the country, but the unavoidable dilution of their testimony which naturally attends trial in a distant location. *United States* v. *Johnson,* 323 U.S. 273, 279 (1944) (concurring opinion)."

The Chief Judge's reference to *United States* v. *Johnson* was particularly aimed at these trenchant observations by Mr. Justice Murphy:

> "Very often the difference between liberty and imprisonment in cases where the direct evidence offered by the government and the defendant is evenly balanced depends upon the presence of character witnesses. The defendant is more likely to obtain their presence in the district of his residence. . . . The inconvenience, expense and loss of time involved in transplanting these witnesses to testify in trials far removed from their homes are often too great to warrant their use. *Moreover, they are likely to lose much of their effectiveness before a distant jury that knows nothing of their reputations."* (Emphasis added.)

The irony of respondent's position is complete with his reliance on *Will* v. *United States,* 389 U.S. 90 (1967) (R. Br. 8). In that case, the government sought mandamus to require the trial judge to vacate an order which the government feared would lead to the disclosure of the names of its witnesses. Here the same

spirit is at work; the government, with respondent's sanction, has successfully resisted petitioner's motion for transfer on the representation that it has thirteen District of Columbia witnesses. Respondent did not inquire and the government did not offer to demonstrate that these witnesses were necessary to relevant matters of proof in the government's case (H. Tr. 36, 43). Yet, the convenience of the government's District of Columbia witnesses was considered and given fulll weight (Pet. App. C, 37-38).

Petitioner, on the contrary, had none of his prospective witnesses considered—this for failure to make a disclosure even more thoroughgoing than that feared by the government in *Will* v. *United States, supra at* 9. The futility of petitioner's motion for transfer is thus starkly displayed. He may remain silent or make a general showing as to the materiality of the testimony of his witnesses and have his motion denied for certain, or he may elect the penalty of disclosing the theory and substance of his defense well in advance of trial in the hope, but without the assurance, that he may be tried close to home and close to the sources of his proof.

CONCLUSION

This is a case of first impression, presenting questions as to the proper implementation of new Fed. R. Crim. P. 21(b) (effective July 1, 1966). The decisions of the courts below will require petitioner and his more than 60 witnesses to travel some 2,500 miles from their homes to participate in the presentation of his defense. These decisions were reached in the face of a new rule whose framers quite explicitly expected would facilitate rather than inhibit the trial of criminal proceedings in districts most convenient for parties and witnesses.

See Notes of Advisory Committee on Rules, 18 U.S.C.A. Rule 21, 1967 Pocket Part at 206. The opposite result has been reached here. And the legitimate inquiry immediately comes to mind: If a transfer is not warranted by the circumstances of this proceeding, when would a transfer be warranted?

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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